UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

DISH NETWORK SERVICE CORP.

and

Case Nos. 29-CA-26129
29-CA-26130
29-CA-26252

LOCAL 1108, COMMUNICATIONS WORKERS
OF AMERICA, AFL-CIO

Sharon Chau, Esq., for the General Counsel
Lowell Peterson, Esq., (Meyer, Suozzi, English & Klein, P.C.), for the Charging Party
George Basara, Esq., (Buchanan Ingersoll), for the Respondent

DECISION

Statement of the Case

Howard Edelman, Administrative Law Judge. Upon a charge and an amended charge filed by Communications Workers of America, Local 1108, herein called the Union, in Case No. 29-CA-26129 on February 19, 2004 and May 13, 2004, respectively, a charge in Case No. 29-CA-26130, and a charge in Case No. 29-CA-26252, the General Counsel of the Board, by the Regional Director of Region 29, issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing on May 17, 2004, herein called the Consolidated Complaint, and a Notice of Motion to amend Consolidated Complaint on June 15, 2004, against Dish Network Service Corp., herein called Respondent.

On May 27, 2004, George Basara, Counsel for Respondent, filed an Answer. In his answer he raised certain affirmative defenses, among the following:

The allegations of the Complaint are barred by the statute of limitations.

and

Certain matters alleged in the Complaint are subject to immediate dismissal under the theories of res judicata and collateral estoppl as they were previously litigated as part of another Complaint that was withdrawn prior to this hearing.

The trial in this matter was held before me on June 28, 29, 30, July 1, September 27, 28, 29, and 30, 2004. At the commencement of this trial, I granted Counsel for the General Counsel's motion to amend the Consolidated Complaint.

Briefs were filed by Counsel for the General Counsel, Counsel for the Union, and Counsel for Respondent, and have been carefully considered. Based upon the entire record herein, including my observation of the demeanor of the witnesses, and the testimony on relevant issues, I make the following findings of fact and conclusions of law.

With respect to credibility, I have found General Counsel's witnesses entirely truthful and credible. With respect to Respondent's witnesses, I have found them to be entirely untruthful. The reasons for my credibility resolutions are fully set forth throughout the fact section of this decision through footnotes, as well as a separate section on credibility.

In view of my credibility resolutions I found Counsel for General Counsel has set forth the credible facts in extremely thorough and yet concise fact section in her brief consistent with my credibility resolutions. In view of these considerations, I have included a large section of the facts set forth in her brief in my decision.

Respondent is engaged in the commercial installation and maintenance of satellite dishes throughout the United States, with its principal office and place of business located in Littleton, Colorado and with a facility located in Farmingdale, New York, where it currently employs approximately 43 unit employees.[1]

Respondent admits it is engaged in interstate commerce within the meaning of Section 2(2), (6) and (7) of the Act.[2]

On June 21, 2001, the Union was certified as the collective-bargaining representative of Respondent's employees in the following unit appropriate for the purposes of collective bargaining, herein called the Unit:

> All full time and regular part-time field installation technicians employed by Respondent at its Farmingdale facility, located at 85 Schmidt Boulevard, Farmingdale, New York, excluding all office clerical employees, guards and supervisors as defined in the Act.

The Collective-Bargaining Negotiations

Within the 10(b) period, the focus of this trial, the parties held approximately 8 bargaining sessions, on September 9, October 28, 29, November 18, 19, 2003, January 29, 30, and April 27, 2004.

April 29, 2003 Session

At this meeting, the Union gave Respondent a proposal. George Basara, Respondent's main negotiator, reviewed it and said that it was closer to what Respondent could accept.

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[1] Currently, Respondent's Farmingdale and Syracuse locations are the only unionized facilities. The union in Syracuse was certified last year. The Pittsburgh location was unionized at one time. Basara, on behalf of Respondent's Pittsburgh office, was negotiating with a union for 1½ years until the employees there submitted a petition withdrawing its desire to be represented by that union.

[2] It is admitted that the Union is a labor organization within Section 2(5) of the Act.

September 9, 2003 Session

Larry DeAngelis, the Union's negotiator began the session by introducing himself to Respondent since this was his first negotiation section.[3] Respondent handed its counterproposals to the Union.

Although Respondent had indicated at the previous session that the parties were closer to an agreement, its counterproposals showed a major setback in negotiations. First, the counterproposal appeared to be a proposal made to another union engaged in negotiations with Respondent. Respondent changed the order of the articles so that the article numbers did not match that of the Union's proposal, and the last page of its counterproposal contained the name of this different union not affiliated with the Union. More significantly, the counterproposals substantially removed or changed already agreed-upon articles.

For example, Respondent changed Section 1, paragraph 2 of the company-union relationship article, a section the parties had agreed upon on October 10, 2001, which provided that Respondent would be required to notify only the shop steward, instead of the Union, when new employees enter the Unit. When questioned on cross examination Basara stated that Respondent was blamed for not recognizing the shop steward in an earlier case so the change was to reflect that Respondent would recognize the steward.[4] Basara also removed Section 4 of this article, which provided that Union representatives be granted time off without pay for Union activities, when the parties had already agreed to it on October 10, 2001.[5]

Basara's only explanation, which he was to repeat often throughout the course of these negotiations, was that there was no agreement until the contract was signed. In this regard, Basara testified that his way of negotiating was not "word by word, paragraph by paragraph", that he might generally agree to certain sections but if the Union has a new proposal on other sections, he may not still agree to what was agreed upon earlier. In fact, Basara testified that there was no such thing as a tentative agreement, even though he might have approved the Union's proposal. Basara contended that even the Union's October 10, 2001, proposal, had language permitting the Union to modify it. Basara, however, admitted that the Union has never said that it would change already agree-upon language.

With respect to compensation, at all times material prior to the Union becoming the bargaining agent, Respondent compensated the Unit by paying them a salary plus a commission based on a points systems. The various tasks performed by the Unit were given different "points." The points had a dollar value. In addition, on a yearly basis, Respondent would evaluate the Unit and increase the salaries of those employees who it thought deserved increases.

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[3] DeAngelis became the Union's main negotiator when the former negotiator, Dennis Trainor, was promoted. Trainor had negotiated on behalf of the Union for about a year and a half.

[4] The Board in *Dish Network Service Corp.,* 339 NLRB No. 147 (2003), held that the Respondent violated Section 8(a)(1) of the Act when its general manager said that the shop steward, Brian Feldman, the alleged discriminatee in this case, could not enter the office (after an employee asked that a steward be present at a meeting where he was to receive a written warning) because the parties had no contract and the Respondent did not recognize the shop stewards.

[5] Respondent's written response to the Union's proposal dated November 8, 2001, indicated that it had agreed to Section 4.

At the beginning of negotiations, the Union sought base salary compensation for the employees. Basara rejected the Union's proposal and indicated that it wished to maintain its current pay structure. Sometime thereafter, Basara eliminated the points system for the rest of the country, but not for this Unit, because the Union had refused to agree to this change. However, in an attempt to meet Respondent's demands, the Union presented a wage proposal on April 29, 2003, that provided for the elimination of the points system and added merit increases and market adjustments to the compensation structure. After indicating that the Union's proposals were close, Respondent changed the Union's formula structure and reverted to base salary compensation alone. Its counterproposal also added the following provision so as to have unilateral control over the Unit's future increases:

> "Employees will thereafter be subject to performance reviews on a yearly basis, at which time their new wage rates will be set. (By Respondent alone) Employees will have to meet the requirements for FSS certifications as set by the Company. Employees must be working in a full duty capacity in order to receive any FSS increase. Employees will not receive any compensation based on 'points' for work performed."

Basara testified that the Union's proposed formula was not "workable" in part because Respondent might change its approach to merit increases in the future. As set forth below, the truth of the matter is that Basara would reject any proposal that did not mirror its existing compensation system, and that it had no intention of changing this or any other aspects of its operations, as if its technicians were not represented by a union.

Basara also changed the non-discrimination article, although the parties had already agreed to the language on October 10, 2001. It used to read in pertinent part:

> The Company and the Union agree that they will not discriminate against any employee covered by this Agreement because of such employee's race, color, religion, sex, age, national origin, marital status, sexual orientation, or because of his/her activities on behalf of the Union, or because the person is disabled, a disabled veteran, or veteran of the Vietnam Era, or other protected classifications recognized by the Federal or applicable state/local law.

Basara changed it to read:

> The Company and the Union agree that they will abide by all state, local and federal laws relating to discrimination.

De Angelis testified that when questioned as to why Respondent changed an already agreed-upon article, Basara responded that Respondent did not want to do more than what it was legally required to do.[6]

[6] Basara testified that he had made the change because of his concern with the language on discrimination based on marital status, in light of the recent talks about rights for gay couples. However, this explanation does not make sense since the agreed upon provision offers protection based on sexual orientation. The more likely reason for the change is that this

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Basara also removed the agency shop article, although the parties had already agreed to this article on October 10, 2001. Basara repeated that there was no agreement until the contract was signed.

In addition to changing and withdrawing already agreed-upon articles, Respondent also made certain proposals that were not calculated to reach an agreement. For example, its management rights proposal on September 9, 2003, reads as follows:

> Except as expressly modified or restricted by a specific provision of this Agreement, all statutory and inherent managerial rights, prerogatives, and functions are retained and vested exclusively in the Company, including, but not limited to the rights, in accordance with its sole and exclusive judgment and discretion to reprimand, suspend, discharge, or otherwise discipline employees; to determine the number of employees to be employed; to hire employees, determine their qualifications and assign and direct their work; to promote, demote, transfer, layoff recall to work; to require employees to undergo random or periodic drug and/or alcohol testing; to set the standards of productivity, the products to be produced, and/or the services to be rendered; to determine the amount and forms of compensation for employees other than that which is set forth herein after giving the union the opportunity to meet and discuss the scope of said compensation; to maintain the efficiency of operations; to determine the personnel, methods, means, and facilities by which operations are conducted; to set the starting and quitting times and the number of hours and shifts to be worked; to use independent contractors to perform work or services; to subcontract, contract out, close down, or relocate the Company's operations or any part thereof; to expand, reduce, alter, combine, transfer, assign, or cease any job, department, operation, or service; to control and regulate the use of machinery, facilities, equipment, and other property of the Company; to introduce new or improved research, production, service, distribution, and maintenance methods, materials, machinery, and equipment; to determine the number, location and operation of departments, divisions, and all other units of the Company; to issue, amend and revise policies, rules, regulations, employee handbooks, and practices; and to take whatever action is either necessary or advisable to determine, manage and fulfill the mission of the Company and to direct the Company's employees.

It is clear that while the Union had agreed that Respondent could retain the rights it already possessed in its policy handbook, Respondent's proposal would permit it to unilaterally change its rights without bargaining with the Union.

Further, Basara's proposed grievance procedure on September 9, 2003, which gives the Union no involvement in the process, reads as follows:

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was Respondent's attempt to further wear down the Union's will to reach an agreement.

> Any employee may notify his/her immediate supervisor or the General Manager of a grievance either verbally or in writing. The supervisor or General Manager shall review the grievance and provide an appropriate response. Any employee dissatisfied with a response may contact the local human resources representative for purposes of objecting to the decision and receiving a response to such objection.

Basara testified that while he was not offering an arbitration provision, the Union and the employees could strike and file unfair labor practice charges. However, he also conceded that if the strike was not due to unfair labor practices, the strikers might be replaced. Needless to say, non-unionized employees may also engage in a strike and file unfair labor practice charges. Basara was giving the Union nothing. Basara's proposal essentially was that in connection with any grievance, Respondent had total control of the disposition of such grievance. It is clear that this proposal, if accepted, would leave the Union with no recourse but to helplessly accept Respondent's unilateral determination or strike and risk being replaced.

At some point during a lull in the negotiations DeAngelis had an off-the record conversation with Basara during which he spoke about the Union's goal in negotiations. In response, Basara set the tone of Respondent's bargaining position and said that his job, in collective-bargaining negotiations was to not give the Union a contract or, to give a contract so bad that it would never be ratified. Namschick and Feldman who were in the Union's negotiation committee were both present and heard the conversation; Namschick's testimony fully corroborated DeAngelis' testimony in this regard. Shop Steward Feldman's testimony was that he only recalled the first part of this statement, that being not to give the Union a contract.

Basara testified that it would be foolish for him to make such off the record statement as testified by DeAngelis, Namschick and Feldman, since he was at the bargaining table with DeAngelis for the first time. Basara claimed instead that his response was that he was there to get a contract that was in the best interest of his client.

Human Resource Generalist DiPietro corroborated Basara's testimony on direct examination.

I find that DeAngelis was a 100% credible witness. His testimony was detailed on direct examination. His answers were delivered in a soft and sincere manner. On cross-examination, his testimony was most responsive and detailed, and delivered in the same soft sincere manner. In connection with DeAngelis' "off the record conversation", described above, Basara angrily and intensely cross-examined DeAngelis as to why such statement was not in his affidavit. DeAngelis testified that he did not include Basara's statement in his affidavit because it was part of an off-the-record discussion and he was reluctant to diminish his reliability as chief negotiator. He testified as to this "off the record" statement upon Counsel for General Counsel's insistence. Basara's cross examination in this connection, was angry, and directed at DeAngelis' testifying to an "off the record" conversation after DeAngelis assured him it would be "off the record." Basara did not cross examine DeAngelis as to the truth of the "off the record" statement. Moreover, DeAngelis admitted that his relations with Basara in negotiations were always candid. Additionally, I find Namschick [7] and Feldman are credible witnesses I was impressed with the

[7] Basara cross examined Namschick as to why there was no statement in his bargaining notes concerning the "off the record statement." It should hardly come as a surprise that

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demeanor of both Feldman and Namschick. Both witnesses were responsive and detailed during cross examination and direct examination. Namschick totally corroborated DeAngelis while Feldman candidly admitted that he could only recall the first part of Basara's statement.[8]

Accordingly, I find both Namschick and Feldman credible witnesses.[9]

DiPietro corroborated Basara's testimony on direct examination.

However, when questioned by me, she attempted to corroborate Basara's testimony by claiming that this statement "stuck out in my mind" because the meeting was held in a different room. However, she admitted that her memory in this regard was refreshed after having heard Basara testify about it. Therefore, I find her testimony is not credible on this issue. Further, my impression as to her lack of credibility will be set forth in detail below.

Accordingly, I conclude that DeAngelis' testimony as to Basara's “off the record” statement is truthful.

October 28, 2003 Session

During this session, the parties continued to discuss their proposals from the earlier sessions. DeAngelis asked Basara to explain Respondent's problem with the subcontracting language proposed earlier by the Union. The subcontracting article in the Union's April 29, 2003, proposals states in part: "It is the earnest intent that the aforementioned subcontracting will not result in an eroding of the bargaining unit or the curtailing of work of the bargaining unit and such subcontracting will not be used a (sic) Union busting tactic." Basara responded that Respondent had no intention to erode the bargaining unit and would subcontract only on a fill-in basis. Basara objected to the term "union busting" and said it would otherwise be agreeable. DeAngelis said that he would come up with language to address those concerns. However, as set forth infra, Basara later reneged on his agreement to accept this exact provision absent the "union busting" language.

DeAngelis asked about the removal of Section 2 of the Benefits article, which stated that the medical premium would remain the same during the term of the agreement. Basara responded that Respondent wanted to retain the right to unilaterally change medical plans and premium rates. Basara testified that Respondent wanted the Unit to be under the same health plan as the non-Union employees (as it was before the Union was certified) and that it "will make modifications as it needs to." Respondent has, in fact, increased the medical premium of the non-unit employees.

Similarly, with respect to the management rights article, DeAngelis testified that since

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Basara's statements were not reflected in his bargaining notes since the comments were "off the record" and did not address any bargaining issues.

[8] Respondent contends that Feldman failed to include Basara's statement in his affidavit dated September 18, 2003. It is important to note that this affidavit was given in support of a pending charge in Case No. 29-CA-25806, filed on August 27, 2003, which resulted in the issuance of a complaint, that alleged that Respondent unilaterally implemented a new employee handbook. The substance of Feldman's affidavit clearly reflects that he was giving testimony only with respect to this allegation.

[9] As will be set forth in detail below, concerning Feldman's testimony, I will set forth in detail why he is a credible witness.

Respondent wanted to be able to unilaterally terminate the rights in its policy handbook during the life of the contract, he asked Basara if Respondent would be willing to negotiate changes it wanted to make in the policies before implementation, and Basara said "No."

October 29, 2003 Session

The parties discussed various articles and the Union stated that it would present a counterproposal.

November 18, 2003 Session

DeAngelis testified that he opened discussions by asking Respondent to give wage increases to the Unit as it had done at its other locations.[10] Basara responded that he would get back to the Union.

DeAngelis testified that since Basara had removed the seniority clause from its counterproposals, he asked if Respondent would revisit the issue of seniority, and Basara said, "Yes." However, as set forth infra, on January 30, 2004, Basara reneged on its agreement to consider seniority without any reason except his usual response, i.e., because Respondent could change agreed-upon language at any time prior to an agreement to the entire contract.

With respect to discussion on the management rights proposal, Basara indicated that Respondent did not have to notify employees before changing their work hours, and that it wanted to retain the right to change medical benefits and premiums on its own.

November 19, 2003 Session

The session began with the Union giving Respondent a partial counterproposal containing articles with Respondent's language that the Union had decided to accept (classification of employees, non-discrimination and travel.) DeAngelis asked Basara to sign off on those articles so that the parties could move on to other issues. However, Basara refused to sign off on new subcontracting language, which removed the term "union busting," since Basara indicated on October 28 that it was acceptable absent this term. Basara refused to sign off on it and said that he would give the Union a counterproposal.

DeAngelis again asked Respondent to give the wage increases to the Unit employees, as it had done for its employees employed elsewhere. In response, Basara asked the Union to agree to eliminate the points system and to accept Respondent's medical plan and new handbook. When DeAngelis said "No," Basara replied: "It's not going to happen."

January 29, 2004 Session

The Union gave its full proposal to Basara. After reviewing it Basara stated they needed the whole day. The parties agreed to meet the next day.

January 30, 2004 Session

At the beginning of the session Basara was aware of a decertification petition that was filed with the Board. In any event, at the beginning of the January 30 session, he asked

[10] The Unit has not received wage increases since the certification of the Unit in 2001.

DeAngelis if he wanted to continue with negotiations given the knowledge that a decertification petition was going to be filed. DeAngelis wanted to continue this session.

At this session, Respondent provided its proposals, which again changed or withdrew already agreed upon articles. For example, the parties had previously agreed to Article 2, Section 1, which reads in pertinent part: "the Company recognized the Union as the sole collective-bargaining agent for the purpose of collective-bargaining… for all of its bargaining unit employees." Respondent's proposals replaced "bargaining unit employees" with "installers at the Farmingdale, NY facility." When questioned, Basara again repeated that there was no agreement until the whole agreement was signed.

Basara also removed the seniority provision in its entirety with no substitute language. DeAngelis asked Basara why Respondent was rejecting seniority when it had already agreed that it would be in the framework. Basara gave his standard answer – there is no agreement on anything until there is an agreement on everything.

With respect to the company-union relationship clause, Basara changed the language of Section 3, although it was agreed-upon on September 9, 2003. In that regard, Basara had agreed to Section 3 on September 9, as follows:

> At any meeting between a representative of the Company and an employee in which discipline (including warnings which are to be recorded as such in the personnel file, suspension, demotion, or discharge) is to be announced, a Union representative may be present if the employee so requests. Time spent in such a meeting shall be considered work time.

Basara's proposed change to Section 3 on January 30, are as follows:

> "At any meeting between a representative of the Company and an employees in which **the intent of the meeting is to conduct an investigation which reasonably may lead to disciplinary action** (including warnings which are to be recorded as such in the personnel file, suspension, demotion, or discharge), a Union representative may be present if the employee so requests, **as long as the representative is available. If a Union representative is not available, then the Employee shall select another union member to attend the investigation interview.**" (changes in bold)

Basara also changed the language of Section 1 and removed Section 4 of the company-union relationship clause as it had done so on September 9, 2003. Again, Basara had already agreed to Sections 1 and 4 of this clause on October 10, 2001.

With respect to wages, Basara again rejected the Union's proposed structure that included merit increases. DeAngelis told Basara that this was a step back, that the Union had originally sought base rates with yearly increases, which was rejected by Basara. The Union then created a formula similar to Respondent's current pay structure, and Basara rejected that, asking instead for base rates with the right to unilaterally set them. Further, as Basara admitted during the trial, two and a half years after the Union was certified, that his proposed hourly rates were lower than the wages the unit employees would have been earning if they worked in non-union facilities.

Basara's proposal also removed Section 2 of the medical benefits article. which stated that the premium would remain the same as those contributed by the non-unionized installers. It should be noted that this article referred to "installers" as opposed to the "bargaining unit," a term that the parties had previously agreed upon. Basara was also proposing to have the right to unilaterally change the medical benefits premium.

DeAngelis testified that with respect to the subcontracting provision, he asked why Basara made more changes when the Union had already removed the term "union busting" and Basara had indicated that this would be agreeable absent the term.[11] Basara again repeated that there was no agreement until the whole agreement was signed.

Regarding the grievance procedure, Basara modified its proposal to include the involvement of the steward only, but again management makes the final determination, as follows:

> All questions, disputes or grievances as to the interpretation or performance of the terms of this Agreement shall first be taken up between the Employer and the grieving employee. In the event no satisfactory settlement of the issue is reached, such question, dispute or grievance shall be reduced to writing by the Union steward within twenty (20) days and shall be considered by the Employer and a response will be provided to the Union steward. All grievances shall be presented to the other party as soon as practicable after the occurrence upon which the same is based.

Again, there is no provision for arbitration. The Union's only course is to accept Respondent's decision, or strike.

Argument

Respondent's actions at the bargaining table alone reflect a coherent strategy to get rid of the Union. Respondent stonewalled at the bargaining table for more than three years, shifting positions and insisting upon unilateral control over wages, grievances, health care and other benefits. Respondent refused to grant the unit employees any of the wage increases that were granted to field technicians at all of the non-union facilities across the country (at least not without the Union agreeing to several important concessions) and made sure, as described below, that the unit employees knew about the growing pay disparity, and helped employees to attempt to decertify the Union. When the decertification effort failed, Respondent fired the sole remaining CWA representative at the shop, Brian Feldman, the shop steward.

However strongly Respondent feels about thwarting unionization, they must meet their obligation to bargain in good faith with the Union that was certified as the exclusive bargaining representative of the employees at Farmingdale.

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[11] The Union's revised provision reads: "The Union acknowledges the fact that the Company has a history of subcontracting out work, which is also performed by installers under the terms of this Agreement. Nothing in this Agreement limits the Company's right to continue to subcontract out work that is also performed by the bargaining unit employees. It is the earnest intent that the aforementioned subcontracting will not result in an eroding of the bargaining unit or the curtailing of work of the bargaining unit." Respondent removed the last sentence of this provision.

Even a quick glance at the Union's proposals, counterproposals, and concessions to Respondent's proposals establishes that this is not a case of a newly certified union trying to overreach. To the contrary, Respondent has repeatedly demonstrated its fundamental hostility to the Union and the collective-bargaining process, has constantly shifted its proposals and has insisted upon total unilateral control of the most basic terms and conditions of employment – wages, benefits, and discipline. Whether Respondent's conduct at the bargaining table is viewed in the context of its broader anti-union activities or simply the collective-bargaining negotiations, the conclusion is inescapable. Respondent has failed and refused to bargain with the intent of reaching agreement, as required by Section 8(a)(5) of the Act.

As the court set forth in *National Labor Relations Board v Reed & Price Mfg., Co.,* 205 F.2d 131, 134 (1st Cir. 1953):

> [T]his is not a simple case where the employer has made a clear refusal to recognize or bargain with the certified representative of its employees. Rather, it is one where the employer engaged in a lengthy series of bargaining conferences, which got nowhere. In such a case the question is whether it is to be inferred from the totality of the employer's conduct that he went through the motions of negotiation as an elaborate pretense with no sincere desire to reach an agreement if possible, or that it bargained in good faith but was unable to arrive at an acceptable agreement with the union.

The totality of Respondent's conduct in the last three years, and within the 10(b) period, demonstrates Respondent's intention to avoid entering into any collective-bargaining agreement and to rid itself of the Union. This includes the Respondent's support for the decertification petition, as described below, its termination of Feldman, described below, and its repeated comments to undermine the Union (e.g., that the employees would make more money if they were non-union and that the Union could do nothing to protect them from termination), also described below.

In connection with the table bargaining alone, and the conduct described in the above paragraph, Basara, who was handling the entire anti-union campaign, set out Respondent's position accurately as to the negotiations alone as well as Respondent's sponsorship of the decertification petition, the discharge of Feldman, the Union shop steward and the other unlawful conduct, described above and below, when he stated to the Union's negotiator and the negotiating committee that, "…his job at bargaining was not to give the Union a contract or to give a contract so bad, it would never be ratified". I find this statement is a virtual admission that the table bargaining was in bad faith, and in violation of Section 8(a)(1) and (5) of the Act. It was made calmly and at the beginning of DeAngelis' first bargaining session after taking over negotiations from the initial Union negotiator, and in response to a question by DeAngelis as to why it was so difficult to reach an agreement. In effect Basara was telling DeAngelis, in an "off the record" statement, that bargaining was futile, and the Union was never going to get a contract. As set forth above, Respondent is a nation-wide company with many locations, none of which are unionized. Respondent wanted to keep its facilities non-union.

The instant case is distinguishable from *St. George Warehouse, Inc.,* 341 NLRB No. 120 (2004) where a similar statement was made. In *St. George,* the employer was angry and frustrated during a negotiation and the statement was made in anger, rather than the calm admission by Basara. In *St. George* the Board concluded that following the attorney's

statement made in anger, further negotiations established that:

> 1. The parties met frequently and regularly.
>
> 2. The employer made concessions and agreed to the union's proposals on a pay differential, appointment of shop stewards, nondiscrimination and severability clauses, Family and Medical Leave Act language, and a grievance and arbitration procedure on the condition that employees could be immediately discharged if they committed certain listed offenses.
>
> 3. The employer proposed a wage increase and later increased that offer. Id. at p. 3-4.

I conclude that nothing in *St. George Warehouse, supra,* insulates Respondent from Basara's admission. As Counsel for the Union correctly points out "*St. George's stands* for the unremarkable proposition that an employer's comments about bargaining is analyzed in the context, as part of the totality of circumstances."

Examining Basara's proposals concerning wages, medical plans and grievance procedures, which are the cornerstones of any collective-bargaining agreement, it is clear that Basara has bargained in bad faith. His proposals, counterproposals, and his withdrawal of proposals he had tentatively agreed upon, with no justification, reflect cynical bargaining.[12]

In connection with proposals that relate to unilateral control of wages and benefits, the Board has held "[R]igid adherence to proposals which are predictably unacceptable to the Union may indicate a predetermination not to reach agreement, or a desire to produce a stalemate, in order to frustrate bargaining and undermine the statutory representative." *Tomco Communications, Inc.,* 220 NLRB 636 (1975), enf. denied*,* 567 F.2d 871 (9th Cir. 1978).[13]

Basara's last proposal on wages set forth hourly rates for the first year of the contract. Those rates were lower than those already being paid to non-union field technicians because of the market adjustments, the conversion of points into base pay, and the interim merit increases:

> Employees will thereafter be subject to performance reviews at which time their new wage rates will be set in accordance with regular Company practices…

This language would grant Respondent the right to change each installer's pay unilaterally after the first contract year – to increase it by whatever amount Respondent determined, to keep it the same, or to decrease, it by whatever amount Respondent determined.[14]

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[12] The dictionary describes "cynical" as "…showing contempt for accepted standards of honesty or morality by one's actions, esp. by actions that exploit the scruples of others." The Random House College Dictionary.

[13] Although the Ninth Circuit denied enforcement of the *Tomco* order, the Board has consistently applied this principle in 8(a)(5) cases. See, *e.g., Kuna Meat Company,* 304 NLRB 1005 (1991).

[14] Dish asserts that it could not reduce wages below the first year base wage. This would be small comfort to someone who was paid above the base (for example, someone who

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Basara testified:

> I think the raise proposals merely indicate that they would get a certain base wage rate, and then they would be subject to the merit system that Dish had.
>
> Q: Correct. Right. And that merit system was in the control of Dish, correct?
>
> A: Yes.

Similarly, Basara' last proposal on benefits gave Respondent the right to make unilateral changes to all aspects of the employee benefits, including premium levels. The Union, desperate to reach agreement, was willing to concede control over the benefit programs as long as the premiums were locked in. Basara refused, meaning that Union-represented employees could find themselves paying substantially increased premiums for reduced benefits, and there would have been nothing the Union could do about it.

The record establishes that after years of frustration and constant battle, the Union was willing to accede to Basara's central goal, which admittedly was to keep all of its employees in the United States in a single benefit plan.

Thus, Basara's testimony at the trial that Respondent had made a grand concession to the Union by agreeing not to impose worse benefits on Farmingdale was just posturing. Basara gave the Union what Basara wanted.

> Judge Edelman: Well, what are you really saying then is that we wanted to keep conditions in Farmingdale the way they were around the country.
>
> Basara: With regard to medical, yes.

The only thing the Union asked in return was that premiums be locked in for the employees in Farmingdale.[15] This was not some theoretical concern; Respondent raised medical premiums in the summer of 2003.

Wages and benefits are mandatory subjects of bargaining. *National Labor Relations Board v Katz,* 369 U.S. 736 (1962). Basara insisted that it be given free rein to set wages after the first year of any contract and premiums at whatever time or times it chooses. It is clear that such position fundamentally undermines the purpose of collective bargaining. Therefore, I find Basara's refusal to relinquish that unilateral control violates Sections 8(a)(1) and (5) of the Act.

It is important to note that Basara insisted not only on the right to make pay changes, or to make pay changes based on an objective concept of "merit", but on a "merit" system whose

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received a "merit" increase in the second year of the contract). The minimum simply set a limit on the amount of pay cut that the Respondent could unilaterally impose.

[15] At the trial, Basara insisted that the Union continued to demand a medical plan that was different from the company-wide plan. After being asked to review the CWA's last proposal, he conceded that the only difference was the limitation on premium increases.

criteria are entirely within the Respondent's discretion to set.

I find such proposals undermines the Union's role as the bargaining representative of the employees in Farmingdale and is unlawful. *McClatchy Newspapers, Inv., v National Labor Relations Board,* 131 F.3d 1026, 1032-1033 (D.C. Cir. 1997), cert. denied, 524 U.S. 937 (1998). This was the last in a string of decisions involving two newspapers' insistence on a merit pay clause which reserved to management the right to set pay and to set the "merit factors determining pay. The D.C. Circuit agreed with the Board that the newspapers' post-impasse imposition of the proposal violated Sections 8(a)(1) and (5). In other words, even thought the employer was free to implement its lawful proposals on mandatory subjects post-impasse, it was unlawful to impose a provision which granted the employer the unilateral right to set "merit" pay based on factors which the employer itself could set. The court agreed that the employers action "could be seen as seeking decollectivization of bargaining," violating Section 8(a)(1). 131 F. 3d at 1033.

The D.C. Circuit approved the application of this analysis to any pay plans which grant an employer unilateral discretion to set individuals' wages, including a plan in which the employer could assign or reassign employees to different fixed wage scales. *Anderson Enterprises v National Labor Relations Board,* 2001 U.S. App. LEXIS 18001 at *7 (D.C. Cir. 2001).

In *The Edward S. Quirk Co, Inc.,* 340 NLRB No. 33, (2003), the Board ruled that an employer could not implement a wage proposal in which it paid employees a base hourly rate but reserved to the employer discretion to "continue its current pay practices", which including adjustments to reflect "current market-place pay." The Board wrote:

Assuming arguendo that the quoted phrase yields a quantifiable amount, the Respondent nonetheless has unfettered discretion to choose that amount or [the base rate]. 2003 NLRB LEXIS 596 at *7.

This is almost exactly the proposal which Dish has insisted upon. Respondent cannot evade the *McClatchy* principle by relying on the fact that its proposal sets a minimum amount. This is what the *Quirk* Board wrote last year:

> [G]iven that the Respondent likewise has virtually total discretion to reduce wages to at least [the base rate], there could no basis for the Board or a reviewing court ever to conclude that the Respondent had improperly cut wages to any rate down to that level. Thus, the wage proposal effectively allows the Respondent to make recurring unilateral changes in wage rate with unfettered discretion. 2003 NLRB LEXIS 596 at *9-10.

The same principle applies to an employer's unilateral control of employee's benefits. *KSM Industries, Inc.,* 336 NLRB 133 (2001), reaffirmed in pertinent part, 337 NLRB 987 (2002).

> [L]ike the merit pay proposal in *McClatchy,* the Respondent's health insurance proposal left no room for bargaining between the Union and the Respondent about the manner, method, and means of providing medical and dental benefits during the term of the contract. 336 NLRB at 135.

This is precisely what Dish demands. The Union expressed willingness to permit Respondent to control all of the terms of the benefit plan except premiums. Although this is not required by law, the Union was at least willing to recognize Respondent's fervent desire to have a single health plan for all of its U.S. employees. However, the Union took the portion that the employees should be able to count on premiums not increasing for the life of the contract. That simple requirement would create no differences in benefit levels or administration and would impose no restrictions on changing providers or making other changes. The only difference would be that the unit employees, the technicians who elected medical coverage, would have a constant amount of money taken out of their paychecks for benefits for the life of the contract. Basara rejected that out of hand.

With respect to the Union's proposal for an arbitration clause, Basara, at all times throughout negotiations, refused to include any provision for arbitration of any disputes.

At the bargaining table, and during the trial, Basara tauntingly reminded the Union that it could always strike if it disagreed with any grievances. At best Basara expressed a willingness to include a grievance procedure which culminates in a final determination by Respondent. In this connection the transcript states:

> Judge Edelman: But it was still the Employer that made the final choice. It was the Union – they could talk, but whatever they said didn't really matter if the management decided that considering everything we want to uphold the original manager's decision, and we find the employee's grievance is without merit… and you weren't offering an arbitration procedure?
>
> A: We were not.
>
> Q: And what you said is we're not going to give you an arbitration procedure; but there is a remedy. You can strike…And, of course, if the employees went on strike they could be replaced?
>
> A: If employees went on strike? Yes. If – yes. Transcript at p. 1039-1040.

This insistence on unilateral control over resolution, over contract disputes, including disputes about individual Union-represented employees, was merely one aspect of Basara's overall strategy to avoid entering into a collective-bargaining agreement and of blocking the Union involvement in any significant term or condition of employment. It would further the Employer's goal of operating the Farmingdale facilities the way it operated before the Union was certified, and the same way all of its other facilities operated.

It is also consistent with Respondent's refusal to recognize the Union stewards and refusal to permit them to participate in the disciplinary process which, according to the Respondent, was a matter for the Respondent and the individual only. *Dish Network Service Corp.,* 339 NLRB No. 147 (2003). The Board found such conduct a violation of the Act.

An employer's refusal to agree to an arbitration provision is important evidence that the employer has not engaged in good faith bargaining. *Hospitality Motor Inn, Inc.,* 249 NLRB 1036, 1040 (1980), affirmed, 667 F.2d 562 (6th Cir. 1982) (applying the "no self-respecting labor organization" test.)

The employer violated section 8(a)(5) in *The Western and Southern Life Insurance Co.,* 188 NLRB 509, 511 (1971). The employer said it "did not want to submit disputes to 'disinterested' persons and preferred to let a disputed matter go to strike."

With respect to retrogressive or surface bargaining, contrary to Basara's suggestion at the trial, the Union does not contend that an employer is irrevocably bound by every commitment it has made in the course of negotiations, regardless of context. However, the Union contends it is inconsistent with the duty to bargaining in good faith with the intent to reach agreement when an employer repeatedly backs in and out of tentative agreements on particular terms or provisions.

Absent full agreement on a full collective-bargaining agreement, either party to the negotiations may add to, alter, modify or delete previously made tentative agreements. However, this rule is qualified by a requirement that such changes may not be motivated by intent to forestall the making of a contract. *TNT Skypak, Inc.,* 328 NLRB 468, 478 (1999), enfd*,* 208 F. 3d 362 (2d Cir. 2000). The withdrawal of a proposal by an employer without good cause is evidence of a lack of good faith bargaining by the employer in violation of Section 8(a)(5) of the Act where the proposal has been tentatively agreed upon. *Suffield Academy,* 336 NLRB 659, 659 (2001), enfd*,* 322 F.3d 196 (2d Cir. 2003). See also, *Arrow Sash & Door Co.,* 281 NLRB 1108, 1108 (1986) (employer's pattern of reneging constituted a tactic to stultify bargaining and a violation of the Act); *Carpenters Local 1780,* 244 NLRB 277, 281 (1979); *Valley West Health Care,* 312 NLRB 247 (1993) (ordering employer to make a proposal which included the tentative agreements and proposals previously made).

Despite Basara's generalized testimony that he and Trainor had a more flexible approach to agreements on individual contract provisions than DeAngelis did, the evidence is clear that the parties did reach tentative agreement on a number of items before Basara simply backed out. Basara ignores the fact that Trainor prepared the bargaining document which identifies the items on which the parties had agreed. He is the person who typed in the words "agreed", "okay", and so forth in the margins, and DeAngelis was simply continuing the practice.

DeAngelis prepared a series of documents setting forth the parties tentative agreements based precisely on Trainor's comments in the margin. Basara refused to agree to or sign off any provisions, even the ones that Basara himself had proposed and the Union had agreed to.

Basara's response to DeAngelis' request for a signoff on these agreed items was always the same: "Nothing is agreed to unless the entire agreement is agreed to." At some level of abstraction, this is true. However, in the real world of collective-bargaining, no party can seriously expect to reach agreement on a complete contract without getting issues resolved and signed off on along the way. If every issue is up for grabs at each bargaining session, there can be no foundation upon which to build an agreement.

DeAngelis was constantly seeking acknowledgment only of tentative agreements on issues. Nothing in the documents the Union provided to Basara and nothing DeAngelis asked of Basara would have even suggested permanent agreement on the relevant provisions. The Union's concern was that Basara seemed to be lurching from position to position, which made it impossible for the Union to gain traction, to rely on anything Basara seemed to have committed Respondent to.

As DeAngelis testified in connection with one of Basara's no agreement on an agreed-upon provision:

> . . . The company again said that there's no agreement until a whole agreement is reached, you know. It's, it's, in my view impossible to bargain a contract when you continually go back to language that has been in the contract for, you know, sessions before and agree[d] to; and then things [get] changed with the answer that there is no agreement until a contract is signed.

Although Basara was constantly insisting at the bargaining table that no issue was settled, his own bargaining notes indicate the contrary. (Respondent Exhibit 3 at Bates stamp pages 133, 145, 149, 190, 192-193, 195-196, 201-203, 292 set forth numerous specific "agreed"s, "ok"s, and check marks.) This demonstrates that Basara was simply engaged in a bargaining ploy to frustrate and to deprive the Union of any traction, and to keep the Union constantly off balance.

It is particularly revealing that Basara relies on its ultimate agreement to Union "proposals", particularly during the last two bargaining sessions, as evidence of the Respondent's good faith – when those were actually Basara's proposals that the Union had already signed off on. Similarly, the Union wound up agreeing to change language that Basara had initially proposed and that the Union had then approved.

The evidence clearly establishes that Basara shifted positions on the issue of wages. At first, the Union proposed wage scales based on length of service with steps for advancement. Basara insisted on its current system. As Basara testified,

> The Company had a different way of doing business than that. For the employees that it had in Dish Network Services Corporation at that time, employees were being paid a certain hourly rate. And then each year at the beginning of the year they would get an evaluation from their supervisors. And based upon that evaluation and score, they would get an increase called a merit increase.

Eventually, the Union abandoned its approach in favor of proposals which the Union intended to be close to Respondent's current system. As DeAngelis testified about what the Union had on the table at the October 29, 2003 bargaining session:

> [Dish] didn't want to have a – in our hourly proposals, we wanted an hourly wage, and then every year a percentage increase on the hourly raise. The company's structure is that they give an hourly raise [wage], and they give merit raises each year. So, they would determine what the merit raise would be .. the Union was actually proposing a formula that was close to what the company now. how the company pays their employees.

Despite the feeling of the Union's negotiators that an agreement was in reach, that there was light at the end of the tunnel, Basara rejected the Union's entire approach and went back to the beginning, with a set base rate for the first year adjusted by unilaterally-determined "merit" adjustments in the second and third years.

Basara's "counterproposal" at the September 9, 2003 meeting graphically demonstrated the Respondent's strategy of shifting its position to prevent the Union from actually nailing down

agreement on anything. That counterproposal did not even pertain to Respondent's negotiations with the Union, as set forth above, was prepared for an entirely different union in an entirely different location, IBEW Local 304.

As set forth above, Basara's admission that the Union would never get a collective-bargaining agreement, or at best, an agreement that the employees would ratify, is reflected by the contract negotiations that took place. An example of such contract might be a contract providing lower wages and other benefits than employees received at all other locations throughout the United States. In any event, the truth of Basara's admission is completely reflected by Basara's proposals, counterproposals and his backing out without reason to tentative agreements throughout the entire course of bargaining. I find Basara's bargaining proposals shockingly blatant. They reflect his complete disregard for the Act.

Without any consideration to other factors in this case like Respondent's support and encouragement to convince its employees to file a decertification petition, and the discharge of the Union's shop steward, I find, based solely on the table bargaining, described above that Respondent, by Basara's flagrant, arrogant, and provocative proposals and other conduct during the negotiations described above, that Respondent has violated Section 8(a)(1) and (5) of the Act. When the other unlawful conduct, described below is considered, finding a violation of 8(a)(1) and (5) is clearly inescapable.

In *National Labor Relations Board v. Overnite Transportation Co., 29*6 NLRB 669, 671 (1989), *enfd.* 938 F. 2d 815, 821-22 (7th Cir. 1991), the employer's statements (it would not sign a contract with the union and would shut down the terminal in order to defeat the union) are viewed alongside the employer's behavior at the bargaining table, there arises a fair inference that it was not bargaining in good faith. See also, *Glomac Plastics, Inc.,* 234 NLRB 1309 fn. 4 (1978), enfd 592 F. 2d 94, 99 (2nd Cir. 1979) (surrounding events and employer comments are indicia of subjective intent motivating conduct at the bargaining table.)

January – February 2004 Events

Technician Rondy Ramah credibly testified that on a Wednesday in early January 2004, at about 7:15 a.m., he and other technicians, including Steve Hibbert, Raj, Cliff, and Levar, were sitting in the cafeteria. At that time, installation manager Tom Murphy came in with technician Brian Bogart, a Respondent agent, as described below. Murphy stood by the door, about 7 or 8 feet away from the employees, as Bogart spoke to them. Bogart held a yellow piece of paper in his hands, and asked them to sign it so as to decertify the Union. Bogart said that Respondent would give the workers a pay increase and 66% of the commission. Bogart handed the paper to Hibbert, who threw the paper on the floor. Bogart then picked up the paper and walked over to Murphy, who was standing by the door the entire time. They whispered to each other and then left the room.

Hibbert credibly testified that after Bogart and Murphy left the cafeteria, technician Joe Lugo, an agent of Respondent, as described below, came in and asked to speak to him in private. They then went to the front of the building – the dispatching area. Lugo spoke about voting out the Union and getting a $2.00 wage increase. Lugo said that he had Bill Savino's (Regional Manager) ear. During their conversation, technician Levar approached them and commented that Respondent could not be trusted. Lugo walked to the back and returned saying that Murphy wanted to speak to Hibbert. Lugo and Hibbert then went to the back of the warehouse, where Hibbert had a conversation with Murphy and Installation Manager Dominick

Turturro.[16]

Hibbert credibly testified that Turturro said that the employees were not getting a contract because Respondent would not allow it.[17] Murphy told Hibbert that he could make a lot of money without the Union - $17.00 per hour. Murphy also said that he had gotten a lot of employees fired, he mentioned Edwardo Desir and William Pennita, and that the Union could not do anything about it.[18] Murphy said that he decided who stays and who goes. He said that Hibbert could be making a lot of money and that the employees had to vote out the Union. Hibbert asked for it in writing, but Murphy said that he could not do it. Turturro said that because of the Union, Respondent was giving the employees a heavy workload. Lugo said – let's vote out CWA and see what happens. If that does not work out, vote in the Teamsters. Technician Andrew then approached them, and Lugo told Andrew that if he voted out the Union, he would get a $2.00 raise. Lugo asked to meet with steward Brian Feldman and Hibbert to talk about voting out the Union. Murphy said that he would also like to meet with Hibbert and Feldman.

Hibbert testified that after breakfast, Feldman went to negotiations, In the car on their way to the office, Lugo admitted to Hibbert that he, Lugo, was getting a promotion to an IT position and that he would make $46,000.

On January 30, Hibbert credibly testified that he met Feldman and Murphy for lunch at the Newsstand Deli. Murphy began by asking Feldman what could be done to make the situation better at the company. Feldman asked why management was offering money to the technicians to vote out the Union. Murphy said that the employees did not need the Union, that they had to pay Union dues, and at the end of the day, they would be losing money. Murphy said that the Union could not get them more money.

Feldman credibly testified that he asked Murphy why he had called the meeting. Murphy responded that he wanted Feldman's suggestions on how to make the place better. Feldman asked Murphy why he was "riding the guys," giving them too much work – 5 jobs a day. Murphy responded that it was not him, and that it was coming from supervisors John Shaw and Bill

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[16] Murphy claimed that it was Hibbert who had approached him because he, Murphy, had been with the company for a long time and that he used to work with Hibbert as a technician. It should be noted that Murphy hadn't been a technician since November 2002, when he became a manager. Turturro was employed as the warehouse manager at the Farmingdale location until November 2003, when he was promoted to installation manager at Respondent's Medford location. Turturro claimed that Hibbert had asked for his opinion as to whether the parties would come to an agreement on the contract. It is not believable that a technician would think that Turturro, who was never employed by Respondent as a technician or a participant in negotiations, would have the basis to form an opinion in this regard. Turturro also conceded that while he came in contact with 12 –15 technicians per day when he was the warehouse manager, he did not speak to them unless they needed equipment.

[17] Although Turturro testified that he had never attended negotiations, that he's never spoken to employees about wages and that no one ever told him that the employees were not getting their increases because of negotiations, he somehow assumed that the employees had not gotten their increases because the parties were negotiating.

[18] Murphy testified that what he told Hibbert was that management had fired employees for good reasons and that the Union could not do anything for them or that they had not done anything for them. When asked by the Administrative Law Judge as to who had been discharged, Murphy responded: "nobody in particular."

Savino. Feldman also asked why Respondent was sending employees to work on roofs in the snow. Murphy again responded that it was not he, and that it was coming from Shaw. Feldman asked why Murphy was telling the employees that New York State law required employees to work two hours of overtime every day. Murphy again said it was Shaw. When Feldman said that he deserved a promotion, Murphy offered to remove a write-up from Feldman's file. Feldman asked Murphy why he was telling the technicians that they would receive raises if they voted out the Union. Murphy said it was not he, and that it was Shaw. Feldman told Murphy that the Union had requested raises for the employees' several times. Murphy asked for it in writing.

Murphy testified that the meeting was arranged by Hibbert pursuant to Feldman's request. I find it is inconceivable that Hibbert, an open Union supporter, and Feldman, the shop steward, would initiate a meeting with Murphy, bypassing the Union. Murphy also testified that he had started the meeting by saying: "Brian, you know I can't talk about any type of money issues. That's not why we are here." Murphy's testimony is clearly incredible. Given Feldman's strong Union support, why would Murphy even think that Feldman would bring up money-related issues? Finally, Murphy admitted that Hibbert had driven him to the restaurant and back to work after the meeting. Apparently Hibbert was not assigned to installation work that day and Murphy testified that he did not inquire as to how Hibbert was going to be part of the meeting and still attend to his assignments. I find the only logical explanation is that it was Murphy who had requested the meeting and made sure Hibbert was available to attend the lunch as well as the breakfast with Lugo and Feldman.

Hibbert credibly testified that after lunch, he returned to the office with Murphy and Feldman returned to negotiations. When they arrived at Murphy's office, Murphy told Hibbert that he would set up a meeting for Hibbert and Bill Savino. Murphy said that Savino could show Hibbert on the computer how much money he could be making without the Union. After this conversation, Hibbert went to the field service manager's office and manager Chris Lannon told him that Murphy was not going to let the employees get a union.

Feldman credibly testified that at about 6:30 a.m., he and Union agents DeAngelis, Namschick and Morrow stood on the sidewalk in front of Respondent's facility, handing to the technicians as they were coming in, letters stating that the Union had requested Respondent to give the appropriate increases to the employees. Feldman testified that Murphy observed these activities because at the time, he was smoking by the alleyway of the facility.

At about 7:30 a.m., at the end of the ATM, a weekly meeting consisting of technicians from both shifts, Lugo told Shaw that he wanted to address Union issues with the technicians. At the ATM meeting Shaw then announced that he was turning the floor over to Lugo, and left. Lugo walked to the front of the room holding a piece of paper, and told the employees to sign a decertification petition to vote out the Union. Feldman asked who had given Lugo permission to hold this meeting on company time. Lugo responded that it was Shaw. Feldman shouted for Lugo to tell Shaw to come into the room. Feldman asked Lugo: "You said the contract was good. You need a letter okaying raises and I gave it to you. So what's the problem now?" Lugo responded that the letter was not good enough. After about 15 minutes of yelling back and forth among the employees, Feldman walked out of the meeting and went to the alleyway outside the room. Lugo then ran up to Feldman, Feldman told him that what he had done was not right. Lugo told Feldman to calm down, and said that he was only putting on a show for Respondent. Lugo explained that he had gotten an IT promotion that would pay him $46,000.

Shaw testified that it was company policy that once a technician was punched in, he was on company time, and thus, could not speak to the union agents who usually stood in front of

the facility on Wednesdays. He further testified that Union issues were not appropriate for ATM's. Yet, Shaw permitted Lugo to address Union issues with the group at the ATM meeting described above. Shaw testified – I gave the man the time to speak – when Lugo made the request. On cross-examination, however, Shaw changed his testimony, as he did on numerous occasions during his trial testimony, and claimed that he did not know Lugo had wanted to discuss Union related issues until he, Lugo, started speaking about the Union, at which point, he, Shaw, left the room because he did not want to be involved. Shaw admitted, however, that he knew on that day that Lugo was advocating "no union" and Feldman was advocating "for the union."

Hibbert credibly testified that in the middle of the meeting described above, he left to go to the restroom. On his way back, Shaw told him to go to the office. Shaw said that he heard about Hibbert's conversation with Murphy about wanting to see something in writing. Shaw then showed him a grid in the computer with the technicians' names and the amount of their pay increases. Shaw showed Hibbert where he was on the grid and said that he could be making $16.00, Hibbert's hourly rate was about $12.00. Hibbert credibly testified that the grid showed that Keith Knipschild, lead technician, would earn over $20.00, Knipschild's hourly rate was about $14.00. Technician Cedric came in and Shaw showed him that he could make $14.25, Cedric's hourly rate was about $11. Shaw told them to keep this under their hats.

Feldman credibly testified that later that day at about 5 p.m., that he asked Shaw if he heard about what had happened at the meeting with Lugo. Shaw responded: "Yeah. It got out of hand." Feldman said that it was not right for Lugo to use company time to talk to the employees about the Union and asked if Shaw had given him permission to do so. Shaw responded that he had. When Feldman asked for equal time to speak to the employees about the Union, Shaw initially refused but ultimately agreed to let Feldman do so one time.[19]

In mid-February Feldman credibly testified that regional manager Bill Savino attended an ATM, which was very unusual. After the meeting, Shaw said that he was turning the floor over to Feldman because of what had happened the prior week. However, Shaw and Savino remained in the room. Feldman asked the employees if they had any questions. Employee Ramah, who was standing in front of Feldman, asked Feldman if he, Ramah, could ask about the employees' raises. Feldman told him to go ahead, and Ramah asked Savino a question. Savino responded that no one was getting raises because the Union was not making the concessions Respondent was asking for at negotiations. He said that the Union would not give up the points system so the Respondent would not give them their raises. Savino spoke about how he made the office nice by having it painted and how he had the trucks fixed, and said that he wished that he could pay more money so that he could hire a better class of technicians.

Feldman credibly testified that after the meeting ended, Savino told him to go to Savino's office. They went to Lynn DiPietro, Human Resource Manager's office, and DiPietro's was sitting at her desk. According to Feldman's credible testimony, Savino then "got right in [Feldman's] face" and called him a "disgrace" for feeding propaganda to the employees. Feldman told Savino to stop calling him a disgrace and it was he, Savino, who was telling the employees the bullshit at the meeting about the Union not agreeing to give raises. Savino asked if Feldman was calling him a liar. Feldman said that he was calling Savino a liar. Savino then said that the meeting was over. Feldman asked DiPietro whether it was true the Union had

[19] Shaw initially testified that Feldman had asked for equal time to speak about the Union, but later changed it to indicate that he was not aware that Feldman would discuss Union-related issues at the following ATM.

asked for raises at negotiation, but she said "No."[20] As they were walking out, Feldman told Savino to stop telling the managers to get the employees to sign the decertification petition. Savino denied telling the managers to get the employees to sign the decertification petition. Feldman told him that he would have to answer to the Labor Board. Just then, Feldman saw that Mark, a new technician, had been standing in the room and overheard the entire conversation. Feldman testified that when he left DiPietro's office, has saw about 20 technicians in a nearby room. Feldman testified that they all must have heard his conversation with Savino because they had been yelling and the room was only about eight feet away from DiPietro's office.

I find the evidence is clear that management planned to be at this meeting, in anticipation that Feldman would address Union issues with the technicians. Savino initially tried to downplay his choice of being at this particular ATM by stating that it was his responsibility to attend these meetings when he was in the office, which was 30% to 40% of his time. However, on cross-examination, when he testified that he had only attended 1 or 2 ATM's at the Farmingdale location per year since 2002, and that he normally arrived to the office at 8:30 a.m. to 9:00 a.m. ATM's were usually held shortly after 7:00 a.m. and were over before 8:30 a.m. Savino then testified that he was required to "hit" only a certain number of meetings per year. He testified that he came to the office "early" that day to attend the ATM to "get it off the books." I find this testimony reflects negatively as to his credibility.

Further, management officials testified that they were not aware that Union issues would come up at the February 11 ATM. Both Shaw and DiPietro testified that they had not expected anyone to bring up Union issues. Shaw testified that at the end of the ATM, he merely opened up the floor for discussion, as he had done in the past, and denied knowing that Feldman would speak at this meeting. However, Shaw's testimony is contradicted by that of Savino, who admitted that Shaw had announced at this ATM, that due to the incident at the prior ATM, he would open up the floor to Feldman. Shaw's testimony is also not credible, in light of the conversation after the ATM from the prior week, during which Feldman complained about Lugo discussing Union issues at the ATM and Shaw agreed to let Feldman have equal time at the February 11 ATM. Again, inconsistent testimony by a Respondent supervisor.

Similarly, Savino on cross-examination, became extremely defensive when asked whether he was aware that Union issues would come up and if he knew about the ongoing decertification efforts when he attended the ATM. After refusing to answer a question put to him directly on cross-examination, he was warned about being argumentative by the Administrative Law Judge and to answer the questions. However, even then, as he had done throughout cross-examination, he responded repeatedly, that's not my concern, especially when cross-examined and asked about the decertification efforts and the Union. Savino is a high level supervisor and must have been aware of the decertification proceedings.

Savino testified he called Feldman to the office because he wanted to know why Feldman was getting other technicians to ask questions for him. The basis of his accusation was that he saw Feldman "whispering" to 2 or 3 nearby technicians, although he could not hear what was being whispered. Savino testified that he did not like to address Union issues at ATM's and that one question "prompted" by Feldman was related to wages. When asked by the

[20] While the evidence is clear that the lack of wage increases was an issue in the decertification effort, DiPietro so admitted on cross-examination only after repeated questions, most of which were asked by the Administrative Law Judge.

Administrative Law Judge as to whether working conditions were discussed at ATM's, Savino again became defensive and would not answer directly, but he did eventually admit that it would not have been a problem if Feldman had asked the question himself. I find Savino not to be a credible witness.

Discussion

January – February 2004 Events

It is well settled that an employer commits an 8(a)(5) violation when it bypasses the union and negotiates the terms of a mandatory subject of bargaining directly with the employees. The criteria to be applied in determining whether an employer has engaged in direct dealing are enumerated in *Southern California Gas Company,* 316 NLRB 979 (1995). The elements necessary for such a finding are:

(1) the employer was communicating directly with union-represented employees;
(2) the discussion was for the purpose of establishing or changing terms and conditions of employment or undercutting the Union's role in bargaining; and
(3) such communication was made to the exclusion of the Union.

Although Section 8(c) of the Act entitles an employer to communicate noncoercively with its unit employees during collective-bargaining negotiations, the Board will find that employer communications violate Section 8(a)(5) if those communications are coercive or constitute direct bargaining between the employer and the employees. *Armored Transport Inc.,* 339 NLRB No. 50 (2003).

"A promise of benefits to employees without taking into account the power and responsibility of their certified collective-bargaining representative, alone, would constitute unlawful 'direct dealing' with employees, in violation of Section 8(a)(5) of the Act. When the promise of such a wage increase, itself violative as direct dealing, is joined to the condition that it would occur after Respondent 'got rid of' the Union, that the direct dealing has an explicit unlawful motive. While unlawful motive is not a condition of a violation of Section 8(a)(5), *National Labor Relations Board v. Laredo Coca Cola Bottling Co.,* 613 F. 2d 1338 (5th Cir. 1980), cert. denied 105 LRRM 2658 (1980), when as here, an unlawful condition is placed in juxtaposition with the promise of benefit, a clear violation is made out." *Langston Companies,* 304 NLRB 1022 (1991).

The credible evidence conclusively establishes that Respondent, by its managers and agents, made numerous promises conditioned upon their support of its Respondent sponsored decertification efforts or their withdrawal of support for the Union. In that regard, in October 2003, general manager Shaw set the tone of the company's position by telling Feldman that his requests for a transfer and promotion were denied because he was a shop steward, but that Respondent would promote him to be manager because that would get him out of the Union. Thereafter, when Respondent began its decertification efforts in early January 2004, agents Bogart and Lugo promised other technicians that they would receive pay increases and commissions if they decertified the Union. Manager Murphy repeated these promises immediately thereafter, and added that they should not support the Union because it could not even help those employees who had been discharged. Lugo and Murphy again made the same promises to employees on January 30 and urged them to decertify the Union. Finally, on February 4, Shaw showed employees a salary chart that set forth how much more they would be paid if they decertified the Union. Thus, the undisputable credible evidence is overwhelming that Respondent engaged in direct dealing by making promises to the technicians in exchange

for their support in the decertification effort, in violation of Section 8(a)(5) of the Act.

The credible evidence also shows that during the lunch meeting on January 30, Murphy spoke about how the employees were better off without the Union, and after he asked what he could do to improve working conditions and Feldman complained about Respondent's refusal to promote him, Murphy indicated that he would be willing to remove a written warning from Feldman's file. This luncheon was arranged at Murphy's request, which was immediately after Lugo requested to meet with Hibbert and Feldman to discuss voting out the Union. Thus, putting this offer in context, it was made clearly to show what Respondent would and could do if the employees did not support the Union. Thus, by offering to remove Feldman's warning, Respondent engaged in direct dealing, in violation to Section 8(a)(5) of the Act.

The evidence establishes that Murphy began the January 30 lunch by asking what he could do to make things better at work. As indicated above, this lunch meeting was set up with Hibbert and Feldman in connection with voting out the Union. This was not merely a situation where management wanted to improve working conditions by speaking to the shop steward. The implication of Murphy's question is that if the facility is union-free, the employees' work related issues would be resolved. I find the foregoing conduct violated Section 8(a)(5) of the Act because it constituted solicitation of grievances, direct dealing with employees over working conditions, and denigrating the Union in the eyes of the employees. See, *Thill, Inc.,* 298 NLRB 669 (1990).

The evidence also shows that during a conversation with technician Hibbert in early January, where both Murphy and supervisor Turturro made unlawful promises and threatened Hibbert that it was futile to support the Union, Turturro stated that because of the Union, Respondent was assigning a heavier workload to the technicians. See, *Schaumburg Hyundai, Inc.,* 318 NLRB 449 (1995).

Agency Status

The test for determining whether an employee is an agent of the employer is whether, under all of the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management. *Waterbed World,* 286 NLRB 425 (1987), enfd. 974 F.2d 1329 (1st Cir. 1992). This test is satisfied when the employee is held out as a conduit for transmitting information from management to other employees. *Cooper Industries,* 328 NLRB 145 (1999). Among other relevant circumstances are (1) the position and duties of the employee, and the context in which the action occurred, *Jules V. Lane,* 262 NLRB 118 (1982), (2) whether the conduct is related to the duties of the employee, *Hausner Hard-Chrome of KY, Inc.,* 326 NLRB 426 (1998), and (3) whether the conduct was consistent with other statements or actions of the employer. Id. at 428. Section 2(13) of the Act provides that "whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

Bogart was a non-supervisory employee and possessed no special title or responsibilities. However, the credible evidence shows that in early January 2004, Bogart promised employees wage increases if they decertified the Union, in the presence of installation manager Murphy, who stood by in silence, thereby acquiescing to Bogart's representations. Further, Bogart's promises were repeated by management thereafter and consistent with Respondent's other numerous 8(a)(1) and (5) conduct. Finally, Bogart admitted to Feldman in a tape recorded conversation, that he initiated the decertification efforts at the direction of

Murphy.[21] Thus, Bogart had the apparent authority to advise the employees of the consequences of decertifying the Union.

The evidence also establishes that Lugo was Respondent's agent, when he solicited technician Hibbert in January 2004, to decertify the Union. Immediately after speaking with Hibbert, Lugo again approached Hibbert with installation managers Murphy and Turturro, who repeated to Hibbert and other technicians who had joined the conversation, Lugo's promises, and added other threats and promises described above and below. Then, in their presence, Lugo again urged employees to sign the decertification petition. Lugo repeated these promises on February 4, 2004, to the employees when management announced that it was turning the floor over to him, during an ATM meeting. Under these circumstances, I find it would be reasonable for the employees to assume that Lugo was speaking on behalf of Respondent.[22]

Even if the Board were not to find Lugo and Bogart as agents within the meaning of Section 2(13) of the Act, I would still conclude their actions were attributable to Respondent since such actions were taken in the presence of supervisory employees.

The evidence shows that in early January 2004, Respondent's agents, Bogart and Lugo urged employees to decertify the Union, sign a decertification petition, and promised that they would receive pay increases and commissions in return. Lugo solicited the technicians to sign a decertification petition on February 4, after Shaw ended the ATM and turned the floor over to him.

The law is clear that an employer may not solicit its employees to circulate or sign decertification petitions and it may not threaten employees in order to secure their support for such petitions. Other than to provide general information about the process on the employees' unsolicited inquiry, an employer has no legitimate role in that activity, either to instigate or to facilitate it. *Armored Transport, Inc.* at p. 4 citing *Harding Glass Co.*, 316 NLRB 985 (1995). Accordingly, I find Bogart and Lugo to be agents within the meaning of the Act. I find such conduct a violation of Section 8(a)(1) and (5).

The evidence shows that during the conversation with technician Hibbert and Manager Murphy, described above, Turturro indicated that the employees were not getting a contract because Respondent would not let them. Murphy also stated that he had fired employees and the Union could not help them. The evidence further establishes that during the January 30 lunch, Murphy told Feldman and Hibbert that the employees did not need the Union because it could not get them more money. After the lunch, Lannon told Hibbert that Murphy was not going to let the Union in. I find these statements of futility by Respondent's supervisors' statements are unlawful and in violation of Section 8(a)(1) of the Act. See *Equipment Trucking Co.*, 333 NLRB 227 (2001), where the employer told employees that it would not sign a contract with the union; *Albert Einstein Medical Center*, 316 NLRB 164 (1995), where the Board found that it was unlawful for a supervisor to tell employees that the union could not help a recently discharged employee get his job back because it was too weak.

The evidence shows that on February 11, 2004, Savino "got right in [Feldman's] face"

[21] In a tape recorded conversation with Feldman, Bogart admitted that he initiated the decertification petition at the direction of Murphy. He later recanted his taped admission. As set forth below, I credit his taped conversation. Otherwise I discredit his testimony.

[22] Lugo did not testify during the course of the trial. As set forth below I credit Hibbert's testimony. Also, as set forth below, I discredit the testimony of Murphy and Turturro.

and called him a "disgrace" for speaking propaganda to the employees. I find this statement, which was heard by many employees who were standing nearby to be demeaning of his position as the Union shop steward and tends to interfere with employees in the exercise of their Section 7 rights, in violation of Section 8(a)(1) of the Act. *Mid Concrete,* 336 NLRB 258, 267 (2001).

In October 2003, Shaw told Feldman that his transfer request was denied because he was the shop steward, and offered Feldman the manager's position because it would get him out of the Union. I find Shaw's statement clearly tends to interfere with employees in the exercise of their Section 7 rights, in violation of Section 8(a)(1) of the Act. *Limbach Company,* 337 NLRB 573, 588 (2002); *Mid-Concrete, supra* at 267.

The evidence establishes that on February 11, Savino told the employees that they were not getting their pay increases because the Union had refused to make concessions at negotiations. I find this statement was a clear attempt to drive a wedge between the employees and the Union by blaming the Union for their lack of pay increases. I find such conduct in violation of Section 8(a)(1) of the Act. See *Fontaine Body and Hoist Co.*, 302 NLRB 863 (1991).

Feldman credibly testified that since the beginning of the year, Respondent began assigning to the technicians about 4 or 5 jobs a day, while they used to get about 3 or 4 jobs. Feldman testified that as the number of jobs assigned increased, the number of pre-site surveys assigned to him also increased.

Respondent contends that the workload in January and February 2004 was about 3 or 4 jobs per day, and that the number of work orders for February 26 was representative of the number of jobs during that period. However, Respondent's work and service orders in evidence are apparently incomplete, and I find therefore, are not reliable. Indeed, a review of these documents with the technicians' time cards for February 26 actually show that the workload was understated for that day

For example, the February 26 records show that technician Matthew Bergin punched out from work at 9:30 p.m., yet he completed his afternoon job at 3:30 p.m. If he was working from 3:30 to 9:30, Respondent did not provide his work orders covering that period; if he was not working, certainly management could have sent him to relieve Feldman on that day. Similarly, there was only one job order for Levar Carter in the afternoon, but that job was apparently cancelled; he punched out at 8:00 p.m. and there was no document to show what work Carter performed that afternoon. Likewise, Rondy Ramah punched out at 7:10 p.m. but there was only one work order (for the morning) for him. Robert DeGruttola, who did relieve Feldman and Alvarez, punched in at 6:39 a.m. and out at 10:15 p.m.; however, there is not one single work order in evidence for him. There is also no work order for Tyron Grandison, yet he worked from 7:56 a.m. to 5:07 p.m. There is no job order for Briel Bennett, but the service agreements in evidence show that he worked on a few jobs and punched out at 6:47 p.m.

Feldman credibly testified that since the beginning of 2004, Respondent began assigning a heavier workload to the technicians. This was admitted by Turturro, who threatened that there was an increase in the number of jobs assigned to the employees because of the Union. Also, when Feldman questioned Murphy about it, not only did Murphy fail to deny this allegation, he admitted that it was coming from Shaw and Savino. Respondent argues that the work orders in evidence established that the technicians were assigned very few jobs. However, I find Respondent's documents are clearly incomplete and therefore, unreliable. The admissions of Turturro and Murphy, along with the overwhelming amount of anti-Union animus described above establish a discriminatory motive. Therefore, I conclude that Respondent

violated Section 8(a)(3) of the Act by assigning a heavier workload to the technicians because of the Union. See *Chinese American Planning Council,* 317 NLRB 202 (1995); *Laminates Unlimited,* 292 NLRB 595 (1989).

The Decertification Petition

By dragging out negotiations for three years, with his bad faith proposals, Basara succeeded in making the Union-represented employees in Farmingdale the lowest-paid in the entire area. All of the other employees received a market adjustment of $2.00 per hour. All of the other employees received an increase in the hourly rate which was the equivalent of about 66% of what they had received, on average, under the convoluted "points" system. All of the other employees had received three years of "merit" increases; in 2003, those average 3%. Therefore, by the time of the decertification campaign, led by Respondent supervisors and agents, the technicians at Farmingdale were paid several dollars an hour less than their counterparts at other Respondent locations, including one a few miles away in Melville.

Although Respondent makes the preposterous suggestion that the Farmingdale technicians learned about the discrepancy second hand from an unnamed technician from somewhere in Connecticut, the fact is that they were shown charts or spreadsheets by Respondent supervisors, which set forth precisely how much more money they would be making if they were non-Union. Even Bogart, the employee and/or agent, admitted he had seen the charts.

The charts were prepared for management[23] in connection with contract negotiations, and management officials had to work hard to calculate the wage differences, as will be set forth below. I conclude based on the evidence, that the only way for the Union-represented employees to see these spreadsheets is if Respondent wanted them to see the numbers.

DiPietro, the Human Resources Manager, did the calculations about how much technicians could be making with the non-Union raises. This took a lot of time and effort because the necessary information was not available in Farmingdale. Therefore, the suggestion that any technician could figure those numbers by themselves is nonsense.

Indeed, the credibility of the numbers was considerably enhanced by their detail. No one had to rely on the rumor mill or educated guesses. The additional money they would be making, and their co-workers would be making, spelled out in black and white, and easy to understand.

The decertification petition was signed and filed in Region 29 by Brian Bogart. Bogart credibly testified:[24]

> I just asked him [John Shaw] where I could – I told him I wanted to file a petition for decertification; where could I get the proper forms. And he told me where.

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[23] I conclude the individual in charge of the "management team" is Basara. Not only was he the chief negotiator at the bargaining table, but had knowledge and approved everything that took place inside the Farmingdale facility, including his approval of the management supported decertification and the approval of Feldman's discharge.

[24] As set forth above and below, I find Bogart to be an incredible witness, except when he testifies to admissions against Respondent's interest.

Q. What did he tell you?

A. He told me I could go on the NLRB website and they have forms on there that I could download.

Bogart testified that he drove to Brooklyn on February 11, 2004, during working time, to file the decertification form at the NLRB. He was accompanied for no apparent reason by co-worker Mike Rodney. He testified that he filled out the form in his car near the NLRB offices and that he called Shaw for help.

Bogart testified that he also filed a roster of Dish employees with the petition and the paper with employees' signatures. He testified that co-worker Joe Lugo gave it to him.

Bogart graphically described Respondent's involvement in the decertification campaign to Feldman on the telephone on June 10, 2004. Feldman sensed that something was up and tape recorded this conversation as follows:

Bogart: I just wanted to tell you that I'm fucking helping this fat cocksucker over there at Dish. If you guys want to have me subpoenaed to court, Tom Murphy gave me the form [decertification petition] to fill out, to get rid of the Union. Tom Murphy helped me fill it out. He told me where to go. He promised me and everybody else involved a raise when all the shit was said and done. . . .

Feldman: Were you there that morning when Savino said he wished he had more money to get a better class of technicians? Remember that meeting we had?

Bogart: yeah. As a mater of fact, he came into the ATM and said he would be able to have better technicians if he could pay more money.

Feldman: Yeah. That's a pair of balls. I understand you covering your ass. I understand that. You do what you got to do. No big deal. But remember, these guys, they'll turn on your ass in to seconds…

Bogart: I fucking sick of this shit. I got fucking dirt on a lot of people there. Between John [Shaw] and Tom [Murphy] and them filling that [decertification petition] form out, and all that shit. You know what? I'm not helping them in court. They want me to go to court and help them and say that I did that all on my own [filing the decertification petition]. You know what? I won't get screwed. All I have to do is tell the truth and they are screwed . . . .

I found Bogart's anger on the tape sincere and genuine. Moreover, his tape recorded conversation had the ring of truth. It was much too detailed and the anger so sincere that I fully credit everything on the tape.[25]

Bogart testified at the trial as a Respondent witness that he called Feldman because he was upset with the company, that Murphy was looking to fire him as a result of the Rochester incident,[26] so he wanted to get Murphy in trouble. Bogart claimed that he, therefore, lied to

[25] Bogart's testimony reflects badly on the credibility of Murphy and Shaw.

[26] Bogart testified that he and 3 other technicians were suspended because while they were staying at a hotel in Rochester, the other technicians were skate boarding and running around in

Continued

Feldman by saying that Murphy had initiated the decertification process and made unlawful promises. Bogart also testified that he was "no longer mad at the company", and thus, implying that he was testifying truthfully. Bogart had admitted during his telephone conversation with Feldman, that he was the only technician involved in the Rochester incident who was still employed at the time of this trial. On cross examination, Bogart admitted that much of the conversation was truthful, e.g. that he was mad at the company, that Murphy was looking to fire him, that he had a new job lined up, that Respondent helped him get the decertification petition and provided information so that he could complete it. I find it incredible for Bogart to initiate this taped telephone call because he wanted to lie to get Murphy into trouble, only to end up giving mostly truthful information. Rather, it was more likely that Bogart was enraged, given the amount of profanities used during the conversation; and decided he would not help management to cover up its unlawful acts by revealing the truth to Feldman, who he knew would relate the information to the Union. Further, and oddly enough, Murphy testified that he had never spoken to Bogart about the Rochester incident, that he did not know why Bogart would think that he, Murphy, was going to have him fired, and that he, Murphy, was not the decision-maker on terminations.

Basara prepared Bogart for trial in order to mitigate the tape recorded damage. However, his preparation was in vain. Bogart's demeanor was unimpressive. He appeared frightened at trial, and his testimony was halting. Moreover, his explanations for his taped statement was not logical or believable.

When confronted on cross examination, with the fact that he had solicited support and signatures for the decertification effort on company time on company premises, Bogart suddenly changed his testimony, disclaimed his "common sense", and asserted that he had not actually known about the prohibition, i.e., filing a decertification petition on company time, at that time.[27]

The evidence establishes that Bogart filed the petition on a work day, and is further evidence of Respondent's active support for the decertification. Bogart could easily have filed the petition on his scheduled days off – Thursday and Friday. For that matter, there was no reason he had to be accompanied by another Respondent employee on the employee's work day. Bogart tried to justify these factors by asserting that he wanted to file as soon as he had received enough signatures. But he had already collected signatures from more than 50% of the eligible employees, and he gathered perhaps one or two additional signatures on the morning of the 11th, when he filed the decertification petition. Although he testified that he first learned about the 30% of signatures the night before when he downloaded the petition form, he had thought that 50% was the required number of signatures. Therefore, there was absolutely no reason for Bogart and Rodney to have filed the petition on a work day. Moreover, Shaw never asked Bogart why he needed to file on a work day, which would be the normal reaction of a manager who really does not care about it.

In addition, Bogart's rationale for having lied to Feldman does not withstand scrutiny. He testified that he was angry with Murphy and wanted to get him in trouble with the Union because he thought Murphy wanted to get him fired because of an incident in Rochester. How would admitting to a violation of the law, thereby getting Respondent "in trouble", help Bogart at all, let

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the hotel. Bogart testified that he was upset because Respondent had not yet decided on the disciplinary action to be taken and he thought they, including himself, would all be fired.

[27] Bogart's shifting protestations of ignorance ring very hollow. He had been a Union shop steward and a member of the Union bargaining committee, and that he testified he had known about the National Labor Relations Board for several years.

alone help him retain his job.

Moreover, on the tape Bogart did not limit his remarks to Tom Murphy. Even though he referred to Murphy as "that fat c---sucker", which does suggest a certain level of hostility, he did not hesitate to implicate the entire company in the decertification effort, implicating Murphy, Shaw, and Respondent Regional Manager Bill Savino. As Bogart testified on tape, "I got fucking dirt on a lot of people there."

The evidence clearly establishes that Respondent's representatives knew about the decertification petition, urged the employees to sign it, and promised employees pay raises if they signed, helped Bogart to fill out the petition, and gave two employees working time off in order to file the petition. Respondent's representatives did everything but sign the petition themselves. I find this a clear violation of Section 8(a)(1) and (5). *Armored Transport, Inc.* at p. 4, citing H*arding Glass Co.,* 316 NLRB 985 (1995).

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On February 19, the NLRB issued an Order Approving Withdrawal of Petition.

Basara testified that Shaw had called him about Bogart being upset because the petition "wasn't going to go through." Shaw, however, testified that he could not even recall speaking to Basara about Bogart or the withdrawal of the petition.[28] Although Basara did not represent Bogart and had no conversations with him in this regard, he objected to the withdrawal of the petition indicating among other reasons, that Bogart had not agreed to the "dismissal" of the petition. Basara justified his objections by claiming that Respondent had a legal obligation to follow the wishes of its employees when they decided that they wanted to decertify the Union.

However, under cross examination Basara admitted that Respondent's real reason for his objection to the withdrawal was that if the Union was decertified that would end his collective-bargaining negotiations with the Union.[29]

The Discharge of Brian Feldman

Feldman was employed as a Field Installation Technician/Field Service Specialist ("FSS") 2 from March 6, 2000 to March 3, 2004, when he was terminated.

Feldman testified that on September 20, 2002, he sustained on-the-job injuries, and was on light duty at the time he was fired. His duty during that period was to conduct pre-site surveys – checking out the sites of the jobs for the following day.

Feldman became the shop steward in June 2001, when the Union was certified as the bargaining representative of the employees, and served in that capacity until his discharge. He also attended almost all the bargaining sessions held between Respondent and the Union. During the past year, Feldman was the Union's only shop steward and the only employee on the negotiating committee. In addition, he provided affidavits to the Board on 6 occasions in connection with prior unfair labor practice charges filed by the Union, and testified in the instant unfair labor practice trial.

Feldman credibly testified that in about April 2003, he passed the FSS 3 certification

[28] Another inconsistency reflecting badly on Shaw's credibility.

[29] On March 12, the NLRB issued a Revised Order Approving Withdrawal of Petition, in response to Respondent's objection to the approval of the withdrawal request of the petition.

test, which entitled him to a promotion. Later in that month, Feldman asked Shaw about the status of his promotion, but Shaw referred him to DiPietro, the director of human resources. Feldman then spoke to DiPietro about his promotion, as well as his earlier request to transfer to the Medford Facility.[30] She told him that he could not be promoted or transferred because he was on light duty. Feldman asked her to show him what provision in the employee handbook indicated that an employee on light duty could not be promoted or transferred. She said that it was not in the handbook but that it was company policy. Feldman asked how it could be company policy if it was not in the handbook.

Feldman credibly testified that in about October 2003, he approached Shaw again about his promotion and transfer request, and Shaw said that Respondent would not promote or transfer him because of his Union affiliation, that he was the shop steward. Shaw said that Respondent was afraid that if it transferred Feldman, the Medford employees would become unionized. Shaw then offered to make Feldman a manager. Feldman asked how Shaw could make him a manager but not promote him to a FSS 3. Shaw responded that it would get him, Feldman, out of the Union.

Shaw admitted to telling Feldman that he would not be transferred to the Medford location or promoted because he was on light-duty,[31] and denied ever saying that it was due to his union affiliation. While Shaw was fully aware of Feldman's Union stewardship and activities, as well as the Respondent's desire to be non-unionized, he nevertheless claimed that it had not crossed his mind that if Feldman was transferred to Medford, he would attempt to organize the Medford employees. It is inconceivable that Shaw, who was also the general manager of the Medford office, would not be aware and concerned that Feldman, and active Union shop steward, and the Union's only shop steward, would try to organize the Medford employees, contrary to the Respondent's agenda.[32]

Feldman testified that on Thursday, February 26, 2004, manager Lannon told him that instead of doing pre-site surveys, he would be the chauffeur for junior technician Rodney Alvarez.[33] Feldman informed Lannon that he had to leave by 5:30 p.m., his scheduled quitting time, and asked if another technician could be assigned since he would not be able to physically help Alvarez. Lannon repeated that Feldman had to chauffeur Alvarez.

Feldman looked at the job list and saw that Alvarez had an afternoon job that would take at least 4 hours to complete. When Alvarez arrived to work, Feldman told Alvarez that he was the driver, and that it was going to be a heavy afternoon. Feldman said that he could not physically help with the jobs, and suggested he speak to Lannon about getting someone else to

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[30] The Medford office, a non-unionized facility, began installation work in about November 2003.

[31] Shaw testified that according to DiPietro, Feldman could not be transferred because he was on light-duty. However, DiPietro testified that she never looked into whether Feldman was eligible to transfer to Medford because he was on light duty, and denied she ever told Feldman that he was not eligible to transfer. Again, inconsistencies between supervisors.

[32] Even DiPietro admitted that it was a concern for Respondent that the Medford office would become unionized if Feldman were to be transferred to Respondent's Medford facility. This further reflects adversely as to Shaw's credibility.

[33] Shaw testified that he assigned Feldman to drive Alvarez because Alvarez had license issues. Shaw also conceded that Feldman was assigned to drive Alvarez the week before and re-injured his shoulder. Feldman completed an accident report regarding this injury and gave it to management.

drive. Alvarez went to speak to Lannon and when Alvarez returned, he said that Lannon told him that Murphy had insisted that Feldman drive him. At that point, Lannon came out and Feldman repeated that he really needed to leave by 5:30 that day. Lannon said not to worry and that he, Feldman, could leave by 5:30.

The credible testimony of technicians Hibbert and Ramah corroborated Feldman's testimony in this regard. Ramah further testified that during the conversation between Feldman and Lannon, he saw Murphy standing behind Lannon in the office.

Feldman testified that when they arrived at their morning job it was cancelled, so he called around to see if other technicians needed help.[34] Hibbert asked for assistance so Feldman and Alvarez went to his job site and helped until 11:00 a.m. They then reported to their scheduled afternoon job at about 12:00 noon, but there was no answer at the customer's house. They went to lunch and returned at about 12:50 p.m., but the customer was still not there. They waited, and at about 3:00 P.M. Feldman called the dispatcher so that she could call the customer's house to see if someone was inside. The dispatcher was about to close the job when the customer pulled up the driveway. Feldman stated that although they could have left at 3:30 p.m., they nevertheless started the job.

Feldman credibly testified that Respondent's practice in a situation where they customer is not home when the technician shows up is that the technician waits at least 30 minutes before closing the job. However, the time range for afternoon jobs is from 12:00 noon to 5:00 p.m., so if the customer return before 5:00, the technician has to return to start the job. Thus, it was not unreasonable for Feldman to wait instead of having to return to the job site if the customer returns.

Feldman testified that at 3:30 p.m., when Alvarez was setting up to start the job, he called and spoke to his supervisor, Billy Glacken, and told him about the situation. Feldman reminded him about having to leave by 5:30 p.m. The only thing Glacken said was to call Murphy. Feldman then called Murphy and explained to him that the customer just arrived, Alvarez was starting at about 3:45 p.m. on a 4-hour job, but that he had to leave by 5:30 p.m. Murphy said that he would call around to see if there was anyone available he could send over.[35]

However, an hour went by and when Murphy had not called, Feldman called him. Murphy told him that there was no one available. Feldman repeated that he had to leave by 5:30 p.m. because of prior commitments. Feldman asked what he, Murphy, wanted him to do, whether he should let Alvarez continue the job or bring him back. Murphy responded that if Feldman left, he would be open for disciplinary action. Feldman again asked what he should do. Murphy said: "It's your call." Feldman then explained the situation to Alvarez, and Alvarez said that he wanted to leave with Feldman. Feldman testified that at that point, the dish was mounted and the job was about half way finished. They then coiled up the wires and placed them in the corner and explained to the customer that another technician would return that day

[34] Although Shaw claimed that a technician in this situation should have called his manager, he conceded that he did not consider the events that had occurred that morning in deciding to terminate Feldman. Murphy also testified that he knew in fact that technicians have called and assisted other technicians without calling the manager.

[35] Feldman testified that it was common for Respondent to send technicians and managers to help cover mid-day jobs, if a technician fell behind on his schedule. Murphy conceded that managers would pick up jobs if they did not have a full crew.

to complete the job. Feldman testified that the customer was not upset by it. There is no evidence that the customer made any complaint to Respondent.

At about 5:25 p.m., Feldman and Alvarez arrived at the office. Feldman testified that as he went to the manager's room, Lannon walked by him, and that Glacken, Quality Assurance Supervisor Frank Radina, and lead technician Keith Knipschild were sitting around. Feldman asked if they had sent anyone out to finish the job. Glacken said that another technician, Rob, presumably Degruttola, was already on his way. Alvarez came in and said that Murphy wanted to speak to Feldman. Feldman went to Murphy and asked what he wanted. Murphy said that they would speak the following morning
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Lannon incredibly testified that after Feldman's call at 3:30 p.m., he and Murphy called the technicians one by one to check their availability. One started from the top of the list and the other from the bottom. However, I find it suspect as to whether they had actually called other technicians. For example, when Lannon was asked to name the technicians with whom he had spoken, other than Rob Degruttola, who later went to complete the job, Lannon could not even name one such technician. In that regard, Lannon testified on direct examination that he did not find a replacement until Feldman had left the customer's house. However, he admitted on cross examination that at about 3:30 p.m., he called Degruttola and told him he was needed to do a job and Degruttola responded that he would do it. Lannon testified that he then called the customer to tell her that a technician would be there within an hour to finish the job because he knew someone would go out there, even though he did not know who. However, on cross examination he admitted that he knew by 3:30 p.m. that Degruttola would cover the job. Thus, by about 3:30 p.m., Lannon could have told Alvarez that he should continue to work because Degruttola would be there to assist and drive him back to the office. Lannon then changed his story again and testified that he did not know "it was a definite" that Degruttola would cover the job, so he did not tell Murphy about finding a replacement until about 4:30 or 5:00 p.m. However, it appears from the constantly changing testimony that Lannon and Murphy did not speak to each other until about 5:30 p.m.[36] Regardless, Lannon also admitted on cross examination that when he called the technicians at 3:30 p.m., they all told him that they had 1 or 1½ hours left on their jobs. Thus, any of those technicians could have been sent to help Alvarez after they were done with their jobs. Lannon is in the shop full-time.

On cross examination, Lannon admitted that he reached technician Rob Degruttola about 3:3 0 – shortly after Feldman had called in – and that Degruttola agreed to cover the Feldman/Alvarez job. Degruttola said he would call Lannon as soon as he finished up his current job, and Lannon anticipated he would be there in an hour or an hour and a half. Accordingly, Lannon called the customer to say another technician would be there in about an hour. Degruttola called Lannon at approximately 4:30 or 4:45 to say he had completed his job and was on his way to the customer's house. Lannon did not know precisely when Degruttola actually arrived; when asked whether Degruttola might have arrived as late as 6:30, he repeated that Degruttola told him at 3:30 "Not more than an hour he should be there."

Lannon incredibly testified that he did not tell Murphy that Degruttola had agreed to cover the job, and did not even remember telling Murphy that Degruttola was on the way to the job. This is simply incredible.

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[36] Lannon apparently was trying to downplay the significance of their lack of communication to each other when he testified that if Murphy had also found a replacement, then both Degruttola and Murphy's technician would work on the job together. Lannon testified that it did not matter if one or two vans went out.

Similarly, Murphy's conduct indicated that he was only setting Feldman up to be fired. Murphy testified that he could not find an available technician. Yet, from 3:30 p.m. to 5:30 p.m., he did not inquire as to whether Lannon was able to find someone or what action they should take. If Respondent was truly concerned about customer service, as Savino had claimed, Murphy would have asked Lannon about available technicians, no later than 4:30 p.m., when he knew Feldman was leaving the job. Further, he could have sent managers Lannon or Glacken, just so no customer would be without television. Instead, Murphy called Shaw, who was out of the office, at about 4:30 p.m. and told him that Feldman was leaving a job without completing it. Shaw hopped on the opportunity to suspend Feldman, and then called DiPietro, who called Savino.[37]

The next day, February 27, Feldman was called to Murphy's office. Also present in the office was Installation Manager Turturro. Murphy told Feldman that because he had left the job the day before, he was temporarily suspended.

DiPietro testified that when she returned to the office on Friday, February 27, she asked Murphy to provide a statement regarding the Feldman incident and to get a statement from technician Alvarez. DiPietro admitted she did not ask for a statement from Lannon and did not speak to him about the incident.

On Monday, March 1, DiPietro met with Shaw and Murphy regarding the investigation. Both Shaw and Murphy wanted Feldman discharged because he had left a job uncompleted and disobeyed Murphy's direct order. DiPietro testified that she then called Savino regarding their decision, and Savino agreed. Shaw conceded that Feldman, who had worked for Respondent for four years, was one of the more experienced technicians and never had any performance or attendance problems. Thus, for management to come to this decision without at least speaking to or getting a statement from Feldman during its investigation, especially in light of its tolerance of much more serious conduct by less senior technicians, as set forth infra, is clearly a deviation from its past practice and indicative of an unlawful motive.[38]

On Wednesday, March 3, Feldman reported to work with Union representative Namschick, and met with Murphy, Shaw and DiPietro in the conference room. Shaw said that they had conducted their investigation, without Feldman and that Feldman was terminated immediately. Shaw then tossed Feldman's termination notice across the table and asked if he had anything to say. Feldman said that he had permission from manager Lannon, that there were 5 managers sitting around when he returned, and that they had already sent Rob (Degruttola) to the job, so what was the big deal? Namschick questioned the kind of investigation Respondent had conducted. Shaw conceded that he had spoken only to Murphy, and not Feldman or Lannon. Alvarez was not disciplined in any way.

Shaw testified that he heard for the first time at the meeting that Feldman had made a request that morning to leave on time, 5:30 p.m., and he was upset because they have always

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[37] Savino testified that he was concerned that the customer's house might be left in disarray, that holes were not covered and the cable all over. When asked how he knew of the condition of the customer's house, Savino responded that he had merely assumed it and that he hadn't asked anybody.

[38] Shaw testified that since he has to review and approve all written warnings, he was familiar with all employees' misconducts and performance problems for which they were disciplined.

tried to accommodate their employees' requests for time off. Murphy then allegedly responded that he had spoken to Lannon, a really untruthful witness, and that Lannon said that no one had asked to leave early.[39] It does not make sense that Murphy would even ask Lannon about it before the meeting if he did not know Feldman's defense was that he had received prior permission from Lannon. Further, given the Respondent's policy of being accommodating, it is illogical that Feldman would not ask for permission and to take the chance that his job assignments would require him to stay beyond 5:30 p.m.

To violate Section 8(a)(3) of the Act an employer's conduct must discriminate in a manner that discourages membership in a labor organization. Under *Wright Line,* 251 NLRB 1083 (1980, enfd. 662 F. 2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *Transportation Management Corp.,* 462 U.S. (1983), the General Counsel has the initial burden of proving that union activity or other employee conduct protected by the Act was a motivating factor in an employer's decision to take adverse action against an employee. A *prima facie* case of discriminatory conduct under Section 8(a)(3) of the Act requires evidence of the following: (1) that the alleged discriminatee be engaged in union activity, (2) that the employer had knowledge of these activities, (3) that the employer's actions were motivated by union animus, and (4) that the discrimination has the effect of encouraging or discouraging union membership. *Downtown Toyota,* 276 NLRB 999, 1014 (1985), citing *National Labor Relations Board v. Transportation Management Corp.,* 462 U.S. 393 (1983); *Wright Line, supra.* Once the General Counsel meets this initial burden, the employer then has the burden to show that it would have taken the same action even in the absence of the protected conduct. *Office of Workers Compensation Programs v. Greenwich Colleries,* 114 S. Ct. 2552-2558 (1994); *Southwest Merchandising Corp.,* 53 F. 3d 1334 (D.C. Cir. 1995), *Manno Electric,* 321 NLRB 278, fn 12 (1996); *Wright Line, supra.* However, when an employer's motives for its actions are found to be false, the circumstances may warrant an inference that true motivation is an unlawful one that the employer desires to conceal. *Limestone Apparel Corp.,* 225 NLRB 722 (1981); G*olden Flake Snake Foods,* 297 NLRB 594, fn. 2 (1990).

The credible testimony establishes that Feldman was a 4 year technician, a good and experienced worker with an unblemished record.

The evidence establishes Feldman was a shop steward and a very strong pro Union supporter who was always expressing his pro Union views to the unit employees. When Lugo spoke at an ATM meeting in February 2004, expressing his anti-union views with Shaw's permission and presence at the meeting, Feldman spoke to Shaw and demanded the right to speak at the next meeting. Shaw refused. However, later he agreed to permit Feldman to speak at the next ATM meeting which was scheduled for February 11.

On February 11, at the ATM meeting with Shaw and Savino present, Feldman opened the meeting asked employees to ask questions, to which he would respond. Following the meeting Savino called Feldman into DiPietro's office and began berating Feldman and at one point called him a "disgrace." At least one other unit employee overheard the entire conversation.

Feldman was also on the negotiating committee and attended most of the bargaining sessions.

[39] Lannon testified that it was his job to inform Murphy if a technician had to leave by a certain time, but that it would be of no consequence to him if he forgot to tell Murphy.

Following the certification, the Board in *Dish Network Service Corp.,* 339 NLRB No. 147 (2003), held that Respondent violated Section 8(a)(1) of the Act when its general manager prohibited Feldman, the Union's shop steward from being present at a grievance a meeting where another employee was to receive a written warning, because the Union had no contract with Respondent and Respondent did not recognize the Union shop steward. In this case Feldman gave affidavits and participated in the trial of the above case.

I find there is no doubt as to Respondent's overall Union animus, and in particular its animus against Feldman.

The timing of Feldman's discharge on March 3, 2004, is also very significant. The discharge came after the February 11 ATM meeting where Savino and Feldman had the angry exchange, described above, and following Respondent's sponsored decertification petition which was withdrawn over Basara's objections.

In addition, Respondent was aware of Feldman's need to leave work early on February 26, at 5:30 p.m., his usual quitting time, and was assured by Lannon not to worry, that he could leave by 5:30 p.m.[40]

The evidence also establishes Lannon, in response to such assurance, had obtained a technician, Rob Degruttola by 3:30 p.m., who could have replaced Feldman before 5:30 p.m. if Lannon had sent him over to Feldman's jobsite. It is interesting to note that on direct examination Lannon testified he did not find a replacement until Feldman had left the job. However, on cross examination he admitted it was 3:30 p.m. when he became aware of Degruttola's availability. Thus, there was no reason to fire Feldman. He had done nothing wrong. Respondent had obtained a replacement.

Based upon the above, I find General Counsel has established a powerful prima facie case.

The burden now shifts to Respondent who must tip the scale in its favor. Respondent's only defense was Feldman's alleged insubordination in leaving the jobsite early. Based upon this defense Respondent puts a pebble on the scale when weighed against General Counsel's mountain of evidence.

Moreover, Respondent's defense dissolves completely when documentary evidence establishes disparate treatment.

Feldman credibly testified that Respondent has always had a progressive disciplinary procedure: first a verbal warning followed by a written warning, if the offense is repeated, and if necessary, termination. Feldman also testified that Respondent had terminated employees in the past without prior warnings, but in very different situations, such as failing a drug test or stealing.

Further, the undisputed documentary evidence established that Respondent had taken less severe disciplinary steps with other employees refusing to perform their jobs. In this regard, disciplinary notices provided by Respondent in response to the General Counsel's subpoena establish that a number of employees were only given warnings when they refused to obey orders to perform job assignments or were otherwise insubordinate. For example, one

[40] As set forth above, I found Lannon to be an untruthful witness.

warning shows that on June 8, 2003, technician Ibrahim Shafwaz refused to perform a job as per his supervisor's directive, because the job was out of his way. There was no discharge.

Similarly, on October 27, 2003, technician Thomas Endres rescheduled a job because the customer had refused to let him install the dish in front of the house, the only spot he claimed had a signal. Manager Murphy then personally went to the customer's house and found a number of locations that were possible for installation. Murphy radioed Endres to return to the customer's house and install the dish at one of the 4 spots. Endres refused and said: "She did not want the dish where I wanted to put it, I'm not going back." Murphy only issued a warning to Endres for insubordination. He also had an earlier warning for being absent on six Sundays from July 20, 2003 to August 24, 2003.

Other written warnings establish that employees were merely repeatedly warned for engaging in more egregious misconduct. Technician Vasilios Garbidakas initially received a warning on August 25, 2002, for no-show no-call on August 18, 19, and 25, 2002. He then received a second warning on November 4, 2002 for rescheduling and leaving a job without informing his manager. About a month later, on December 2, 2002, Garbidakas refused to go to a job claiming it was too dark to climb on a ladder. When told to first go to the customer's house and survey the situation, Garbidakas told his manager in a "very abrasive disrespectful manner": "You know what I don't like your attitude." He had earlier that day failed to inform his manager before leaving the office, as directed, and spoke to his manager in a disrespectful manner. Again, Garbidakas received only a written warning. Later that month, on December 31, he failed to contact his manager or carry his radio so he could be contacted, and used "very vulgar" language with his manager. Nevertheless, he was not fired. He received a warning stating that his action constituted "insubordination." Garbidakas became confrontational and "… being very hostile towards me. I feel that he is trying to push me into an altercation." Garbidakas was still not discharged. He was finally discharged on March 5, 2003, after not reporting to work on three days.

Finally, Respondent demonstrated a high tolerance for insubordination in the case of technician James Conigliaro, a fairly new employee hired on September 4, 2002. Conigliaro received a warning February 22, 2003, for a no-show no-call on one day, and leaving early without getting prior approval on 2 days. He received another warning on May 15, 2003, after he called Shaw and manager Murphy "fucking assholes" for sending him home for not having his driver's license and time card for the second consecutive day. A week later, on May 22, Conigliaro refused to go on a roof because it was wet. When Murphy offered to send someone to help him, Conigliaro responded: "You could send whoever you want out, I'm still not doing the job." The written warning given to Conigliaro stated that no other jobs were canceled that day due to weather related issues and this job was completed by another technician later that morning. Conigliaro was not discharged. Instead, Murphy gave him a warning stating the Conigliaro must "follow reasonable work directive (sic) from his manager's (sic). Failure to do so is insubordination." Murphy gave him a <u>final</u> warning for a series of misconduct: no-show no-call on May 24, arriving to his job 1½ hours late because he was having breakfast on May 28, and not having his drill at a job and driving the company van in excessive speed and in a dangerous manner on May 29. Murphy gave him a <u>second final</u> warning for no-show no-call on May 31. On June 18, Conigliaro again refused to go on a roof because it was wet, although Murphy offered other ways to perform this job, stating: "I don't care what you say, I'm not doing this job." He then refused to return to his office when directed by Murphy. The next day, Murphy told him to fill out an approval card because he had not punched out. It was only after he wrote his return time as 5:30 p.m., when he had actually returned at 3:30 p.m., that Murphy finally fired him for falsifying a company record.

Accordingly, I conclude that Respondent has failed to establish his *Wright Line* burden, and I find that by terminating Feldman, a shop steward, Respondent violated Section 8(a)(1), (3) and (4) of the Act.

Counsel for Respondent contends the allegations in the consolidated complaint are barred by the statute of limitations, and subject to dismissal under the theories of res judicata and/or collateral estoppel.

Section 10(b) of the Act provides "That no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made…"

On August 12, 2002, the Union filed a charge in Case No. 29-CA-25088, and the Region issued Complaint alleging that Respondent failed to bargain in good faith by delaying to meet and bargain, canceling scheduled bargaining sessions and failing to thereafter reschedule them, delaying in providing information to the Union, withdrawing its consideration of the Union's proposal for a medical plan, announcing the implementation of a new testing requirement, refusing to consider the Union's proposal regarding dues, proposing an unreasonable grievance procedure, wage increase schedule and medical plan. On June 26, 2003, the Administrative Law Judge in the instant case approved the Union's request to withdraw, after the parties entered into an out-of-Board settlement.

Respondent argues that because the above unfair labor practices were already alleged in charges/complaints, subsequent but similar unfair labor practices are somehow barred. I find such argument simply ludicrous and almost unworthy of a response. If Respondent's theory was correct, it would then be free to commit similar unfair practices repeatedly, as long as they were alleged in a charge at one time. The 8(a)(5) conduct that gave rise to the charge in Case No. 29-CA-26130 filed on February 19, 2004, occurred on September 9, 2003, well within Section 10(b) period.

Equally ludicrous are Respondent's affirmative defenses of collateral estoppel and res judicata, since the issue in this case were never litigated or determined by a valid and final judgment. See *Federal Security, Inc.,* 336 NLRB 703 (2001); *Caterpillar, Inc.,* 332 NLRB 1116 (2000).

In order to set forth the conduct alleged in the complaint that took place in Respondent's Farmingdale facility, credibility resolutions must be made. I have carefully read the record and the briefs filed by all parties and conclude that all the General Counsel's witnesses are entirely credible, and all Respondent witnesses are incredible and simply not truthful. As the testimony within Respondent's Farmingdale facility unfolds there are simply too many inconsistencies and contradictions within a Respondent witnesses' testimony, and too many inconsistencies and contradictions between Respondent witnesses. During my presentation of the facts, I have set forth such inconsistencies and contradictions in the body when applicable and in footnotes.

Credibility Resolutions

1. General Counsel's Witnesses

I found General Counsel's witnesses were forthright and credible witnesses. Each witness made a sincere effort to testify as to their honest recollections of what they did, what they observed and what was said. Their testimony was also mutually corroborative on every essential point, yet did not appear coached or rehearsed. Both Stephen Hibbert and Rondy

Ramah, current employees of Respondent, testified at the trial consistently with their affidavits. They testified in a forthright manner about Respondent's numerous unlawful statements and threats and incidents of direct dealing with them and other employees, as well as Feldman's conversations with Lannon during which Feldman received permission to leave at 5:30 p.m., the day in question concerning his discharge.[41]

I find Feldman to be an extremely credible witness. I was impressed with his demeanor. Feldman testified in a forthright and credible manner about his undisputed protected activities and communications with management that finally led to his discharge. While testifying, Feldman displayed calmness and assurance by answering all questions on cross examination without hesitation and by providing a full and detailed explanation of events. Any inconsistencies in his testimony were minor and did not in my opinion reflect adversely on his credibility. Larry DeAngelis and Richard Namschick also testified in a forthright and cooperative, and consistent manner. I was also impressed by their demeanor. Importantly, the witnesses' testimony remained consistent throughout questioning by General Counsel, myself and the rigorous and lengthy questioning of Respondent's Counsel. I find both of them to be credible witnesses.

2. Respondent's Witnesses

Respondent's witnesses offered testimony that was, from beginning to end, riddled with inconsistencies and contradictions. The demeanor of many of its witnesses, particularly Basara, Savino, Murphy and Lannon, was belligerent and resistant on cross examination. While testifying at great length during direct examination, Respondent's witnesses grew suspiciously evasive and confrontational during cross examination. They claimed not to understand straightforward, simple questions put to them. They artfully tried to avoid answering questions directly and often gave unresponsive answers. They were evasive as to details that they perceived would be damaging to their case.

Brian Bogart is simply an untruthful witness. In a tape recorded telephone conversation he made admissions against Respondent. His taped conversation was earnest and detailed and related to Respondent's involvement in encouraging and assisting Respondent in getting employees to sign and file the decertification petition with Region 29. I credit his direct. He admitted he knew his conversation was being taped. He was evasive when asked on direct examination as to the details, but did not deny any recorded conversation on the tape. There is no doubt in my mind that the evasiveness was the result of his witness preparation by Basara. At trial, during cross examination by Respondent he was also unsure of facts, tentative, and clearly anxious to leave the witness box which he obviously considered a hot seat. I find his taped conversation to be true and his later denials on cross examination to be untruthful.

Respondent's other witnesses also exhibited a willingness to say anything at all, no matter how preposterous, illogical, exaggerated or false, to avoid appearing anti-union and to cover up their unlawful motives.[42] In that regard, throughout cross examination, Savino

[41] The Board recognized "the testimony of current employees that contradicts or is adverse to statements of their supervisors is given at considerable risk of economic reprisal, including loss of employment, and for these reasons is not likely to be false… and particularly reliable." *Mar-Jam Supply,* 337 NLRB No. 46 (2001), citing *Shop-Rite Supermarket,* 231 NLRB 500 fn. 22 (1977); *Flexsteel Industries,* 316 NLRB 745 (1995), enfd. Mem 83 F.3d 419 (5th Cir. 1996).

[42] The myriad of inconsistencies in connection with one Respondent witness and the inconsistencies between Respondent's witnesses generally, in addition to their demeanor lead

Continued

repeatedly claimed, in response to any questions put to him on cross examination relating to the Union, that it was not his concern. On cross examination, he also often avoided answering questions directly and generally gave unresponsive answers. He was defensive and hostile, and continued to be so, even after I warned him about being argumentative.

Similarly, Basara appeared insincere, defensive and hostile throughout his cross examination. His arguments and testimony in support of Respondent's position that it had not engaged in surface bargaining was shockingly blatant and at times laughable, and reflects his total disregard for labor law. Thus, I conclude Basara is not a credible witness.

I also discredit Shaw. His testimony was replete with self-contradictions described above in footnotes. DiPietro's demeanor and manner seemed rehearsed, rather than forthright. She also became confrontational during cross examination and was often evasive when answering straightforward questions.

Turtorro's testimony is likewise not believable; it is not logical that Hibbert would approach him for information about contract negotiations, since Turtorro never attended any negotiation sessions, that he was never employed as a technician, and that he never spoke to the technicians when he was the warehouse manager except when they needed equipment.

Lannon's demeanor on cross examination from beginning to end was uncooperative. His testimony on cross examination was very defensive. He could not recall details, or at times, anything at all, when the answer might be damaging to Respondent's case. At times he was simply laughable. Incredibly, he claimed not to know about the filing of the decertification petition or that technicians at non-unionized facilities were paid more money. He also denied having any conversation with management regarding the decertification of the Union. It is interesting to note that Lannon on cross examination initially claimed that he had not gone over or reviewed his testimony about Feldman's discharge with anybody, and that he had not reviewed his testimony with Basara. After much questioning in this regard, Lannon caught on, and on re-direct examination by Basara changed his testimony and admitted that he had spoken to Basara about his testimony.

Similarly, Savino became extremely defensive and evasive when asked whether he was aware that Union issues would come up at the ATM meeting he attended, and if he knew about the ongoing decertification efforts when he attended the ATM. After refusing to answer directly he was warned about being argumentative by me and to answer the questions. However, even then, as he had done throughout cross examination, he was evasive and responded repeatedly – that's not my concern. Anytime he was asked about the decertification efforts and the Union, he responded that's not my concern. This testimony reflects badly on his credibly, especially since he is a high level supervisor and should be expected to know about such things. Savino testified he called Feldman to the office because he wanted to know why Feldman was getting other technicians to ask questions for him. The basis of his accusation was that he saw Feldman "whispering" to 2 or 3 nearby technicians, although he could not hear what was being whispered. Savino testified that he did not like to address Union issues at ATMs and that one question "prompted" by Feldman to one employee was related to wages. When asked by me as to whether working conditions were discussed at ATMs, Savino again became defensive and would not answer directly, but he did eventually concede that it would not have been a problem if Feldman had asked the question himself, rather than prompting another employee to ask the

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me to conclude they are absolutely untruthful. These inconsistencies are so numerous that they have been set forth in footnotes during the Facts of this decision.

question. Again Savino's credibility is negatively affected.

As set forth above, there is simply an overwhelming number of internal inconsistencies among the testimony of Respondent's witnesses, e.g., the action taken by Lannon and Murphy regarding the Feldman incident on February 26, 2004; the testimony of Shaw, Bogart and Murphy in connection with the decertification efforts; the testimony of Shaw and DiPietro regarding Feldman's requests for promotion and transfer, etc. Other examples of the contradictions, inconsistencies and incredible exaggerations by Respondent's witnesses are too many, in fact, to recite herein. However, examples are set forth throughout the Facts section and in footnotes.

In some instances, Respondent's counsel relied on leading questions to guide Respondent's witnesses' testimony. For example, I had to warn Respondent's counsel on several occasions about using leading questions in the direct examination of Murphy. Testimony elicited in this manner is entitled to little, if any, weight. See *Alterman Transportation Lines,* 308 NLRB 1282, 1287 (1992); *Manufacturing Services, Inc.,* 295 NLRB 254 (1989).

For all the reasons cited above and below, I find that Respondent's witnesses are untruthful, and not worthy of belief.

Conclusions of Law

1. Respondent is engaged in interstate commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union, at all times material herein, is the certified collective-bargaining representative in a unit of: All full-time and regular part-time field installation technicians employed by Respondent at its Farmingdale facility, located at 85 Schmidt Boulevard, Farmingdale, New York, excluding all office clerical employees, guards and supervisors as defined in Section 2(11) of the Act.

4. Respondent committed numerous violations of Section 8(a)(1) and (3) of the Act described in the body of this Decision.

5. Respondent violated Sections 8(a)(1), (3) and (4) by the termination of shop steward Brian Feldman.

6. Respondent violated Section 8(a)(1) and (5) by bargaining in bad faith, and by other acts described in the body of this Decision.

Remedy

Having found Respondent has engaged in the unfair labor practices described above, I shall recommend Respondent be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Accordingly, I shall issue a recommended Order requiring Respondent to cease and desist conduct described as a violation of the Act above.

With respect to the discharge of Brian Feldman, on March 3, 2004, I shall recommend

that he be offered unconditional reinstatement to his former position of employment, or if such position no longer exists, to a substantially equivalent position of employment without prejudice to his seniority, or other rights previously enjoyed by him. I shall further recommend that he be made whole for any loss of earnings, or other benefits suffered as a result of his discharge, from the date of such action until the date that a valid offer of reinstatement, as defined by the Board is made by Respondent. Backpay is computed in accordance with *F.W. Woolworth Co.,* 90 NLRB 289 (1950) with interest as prescribed by *New Horizon for the Retarded,* 283 NLRB 1173 (1987).

I shall also issue a recommended order that Respondent shall provide employees' requests for transfer, be granted within the bargaining unit, or to any other Respondent facility if they are qualified for such positions, notwithstanding their membership in or activities on behalf of the Union.

I shall also recommend that Respondent bargain with the Union upon request, and if an agreement is reached embody it in a signed collective-bargaining agreement.

In this case, Respondent did not engage in good faith bargaining at all. What Basara did do for 3 years of meetings, which can't really be described as collective-bargaining sessions, is to insist upon contract proposals which gave the Respondent the unfettered, and unilateral right to set the wages, hours, medical coverage and other conditions of employment. Basara then cynically proposed a grievance procedure without any arbitration clause, providing cynically that the Union could strike, but the strikers could be replaced absent an unfair labor practice.

Inasmuch as I have found above that Respondent was bargaining in bad faith with the Union from the inception of bargaining. I shall recommend that the certification be extended by one year from the date that good faith bargaining begins. *Altofer Machinery,* supra ALJD Slip Op at 3; *Bryant & Stratton* supra at 1007, 1045.

Both Union and Counsel for the General Counsel have requested a special remedy that Respondent be required to pay litigation costs incurred by the Union and the General Counsel. See *Frontier Hotel & Casino,* 318 NLRB 857 (1995), where the board ordered the reimbursement of the litigation costs of the union and the General Counsel, including attorney's fees, finding that "Respondent demonstrated egregious bad faith – in the surface bargaining conduct giving rise to the unfair labor practice allegations, in its adherence to frivolous defenses, which necessitated the litigation of those allegations, and in the presentation of those defenses through the testimony of Keiler [the employer's attorney and negotiator]." See also *Tidee Products,* 194 NLRB 1234 (1972), where the Board held that, in order to effectuate the policies of the Act and serve the public interest, it had the authority to award costs and expenses in situations where a respondent engaged in frivolous litigation; *Isratex, Inc.* 29-CA-18177 & 29-CA-18678 (1996) (not reported in the Board volumes), where the Board adopted the Judge's recommendation to grant the Union's request for reimbursement of litigation expenses. *Wellman Industrial,* 248 NLRB 325, 329-330 (1980) and *Harowe Servo Controls,* 250 NLRB 958, 965 (1980).[43]

[43] The Union requested the above special remedy in its brief. General Counsel requested similar relief by a letter dated November 23, 2004 and joining the Union's request described above. Counsel for Respondent objected to General Counsel's letter, contending it was not timely filed. I overrule Respondent's objection since it is the same relief sought by the Union in its brief, which was timely filed. Accordingly, I shall recommend such relief in my Order.

The Union also requested that the Board require Respondent to mail a copy of the Board's notice to all employees on its payroll and have Respondent's high officials read the notice to its assembled unit employees. See *Harbor Cruises,* 319 NLRB 822 (1995). Accordingly, I shall recommend that Basara, who was the sole negotiator for Respondent and in overall charge concerning all matters inside the Farmingdale facility relating to this case, read the Order in this Decision to all assembled unit employees.

On the foregoing findings of fact and conclusions of law, and based upon the entire record, I issue the following recommended:

ORDER[44]

Respondent, Dish Network Service Corp., Farmingdale, New York, its offices, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Unilaterally promising employees wage increases, commissions, special accommodations and other benefits in order to discourage their membership in, or activities on behalf of Local 1108, Communications Workers of America, AFL-CIO, herein called the Union.

(b) Offering to Brian Feldman and other employees to remove written warnings if they do not become members of or engage in activities on behalf of the Union.

(c) Soliciting grievances from its employees with promises or implied promises to remedy such grievances because of their membership in or activities on behalf of the Union.

(d) Threatening its employees with more onerous working conditions because of their membership in, or activities on behalf of the Union.

(e) Soliciting employees to file a decertification petition against the Union.

(f) Informing employees that it was futile to support the Union

(g) Demeaning Union officials in the presence of employees.

(h) Denying employees' transfer requests because of their membership in, or activities on behalf of the Union.

(i) Blaming the Union for lack of pay raises.

(j) Assigning its employees extra work ("riding the guys") because of their membership in, or activities on behalf of the Union.

(k) Terminating employees because of their membership in, or activities on behalf of the Union.

[44] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 104.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(l) Engaging in surface and bad faith bargaining with the Union which is the exclusive collective-bargaining representative of employees in an appropriate unit of:

All full time and regular part-time field installation technicians employed by Respondent at its Farmingdale facility, located at 85 Schmidt Boulevard, Farmingdale, New York, excluding all office clerical employees, guards and supervisors as defined in the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of this Order make an unconditional offer to Brian Feldman to his former position of employment, and if such position no longer exists, to a substantially equivalent position of employment without prejudice to his seniority or other rights and privileges previously enjoyed.

(b) Within 14 days of this Order make Feldman whole as set forth above in the Remedy provisions of this Decision. Backpay to start as of March 3, 2004, and to continue until a valid offer of reinstatement is made.

(c) Within 14 days of this Order expunge from the personnel file of Feldman any written warnings, and any documents relating to Feldman's discharge.

(d) Preserve, and within 14 days of a request, make available to the Board or its agents for copying, payroll records, social security payments, time cards and all other records necessary to determine the amount of backpay due under the terms of this Order.

(e) Approve requests for transfers within the Farmingdale facility or to other facilities to all unit employees, if qualified, including employees who are members of the Union, or engaged in activities on behalf of the Union.

(f) On request, bargain in good faith with the Union as the exclusive collective-bargaining representative of all employees in the certified unit, described above and embody any agreement reached in a written collective-bargaining agreement. The certification shall extend one year from the date that such good faith bargaining begins.

(g) Respondent shall be required to pay all litigation costs incurred by the Union and General Counsel, including attorney's fees.

(h) Respondent shall mail to all its employees on the payroll in the Farmingdale facility, copies of the notice herein.

(i) George Basara, Esq. shall be required to read to all assembled unit employees on the payroll a copy of the Order herein.

(j) Within 14 days after service by the Region, post at its Farmingdale, New York facility copies of the attached Notice marked "Appendix."[45] Copies of the Notice, on forms provided by

[45] If this Order is enforced by a Judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board".

the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where Notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the Notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense a copy of the Notice to all current employees and former employees employed by the Respondent at any time since August 1, 2001.

Dated:

_____

Howard Edelman
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT unilaterally promise employees wage increases, commissions, special accommodations and other benefits in order to discourage their membership in, or activities on behalf of Local 1108, Communications Workers of America, AFL-CIO, herein called the Union.

WE WILL NOT offer to Brian Feldman and other employees to remove written warnings if they do not become members of or engage in activities on behalf of the Union.

WE WILL NOT solicit grievances from our employees with promises or implied promises to remedy such grievances because of their membership in or activities on behalf of the Union.

WE WILL NOT threaten our employees with more onerous working conditions because of their membership in, or activities on behalf of the Union.

WE WILL NOT solicit employees to file a decertification petition against the Union.

WE WILL NOT inform employees that it is futile to support the Union.

WE WILL NOT demean Union officials in the presence of employees.

WE WILL not deny employees' transfer request because of their membership in, or activities on behalf of the Union.

WE WILL NOT blame the Union for lack of pay raises.

WE WILL NOT assign our employees extra work ("riding the guys") because of their membership in, or activities on behalf of the Union.

WE WILL NOT terminate employees because of their membership in, or activities on behalf of the Union.

WE WILL NOT engage in surface and bad faith bargaining with the Union which is the exclusive collective bargaining representative of employees in an appropriate unit of:

All full time and regular part-time field installation technicians employed by Respondent at its Farmingdale facility, located at 85 Schmidt Boulevard, Farmingdale, New York, excluding all office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT in any manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days of this Order make an unconditional offer to Brian Feldman to his former position of employment, and if such position no longer exists, to a substantially equivalent position of employment without prejudice to his seniority or other rights and privileges previously enjoyed.

WE WILL within 14 days of this Order make Brian Feldman whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL within 14 days of this Order expunge from the personnel file of Feldman any written warnings, and any documents relating to Feldman's discharge.

WE WILL approve requests for transfers within the Farmingdale facility or to other facilities to all unit employees, if qualified, including employees who are members of the Union, or engaged in activities on behalf of the Union.

WE WILL upon request, bargain in good faith with the Union as the exclusive collective-bargaining representative of all employees in the certified unit, described above and embody any agreement reached in a written collective-bargaining agreement. The certification shall extend one year from the date that such good faith bargaining begins.

Dish Network Service Corp.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

One MetroTech Center (North), Jay Street and Myrtle Avenue, 10th Floor, Brooklyn, NY 11201-4201

(718) 330-7713, Hours: 9 a.m. to 5:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (718) 330-2862.